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PREFACE.

THIS work is intended to be, as nearly as possible, purely practical. The existing practice of the Court of Chancery is, to a considerable extent, a combination of the new rules and forms of procedure under the two acts of the 15 & 16 of the Queen, and of the practice existing before the great alterations effected by those statutes; and it is sometimes difficult to disentangle them.

What I have endeavoured to do, is, to state the practice *as it now is*: whether it be a relic of the old practice untouched, as is on some points the case; or whether it be a combination of the two; or whether it be purely new practice under the Statutes and Orders, I have not found the task easy, and I have not spared either labour or care in my endeavour to execute it.

I have avoided as much as possible all subjects of pure Pleading, which fall properly under quite a distinct head, and would only have encumbered and uselessly increased the length and expense of the work. It has been, however, impossible altogether to avoid touching

here and there on questions which are inextricably mixed up with practice, although in themselves, perhaps, bordering more properly on Pleading, or on the general principles of Equity.

I have appended the two acts of the 15 & 16 of the Queen, with Notes of the Cases decided, under each section; and the Orders of 1850, on Claims, and the Orders of August, 1852, and those since issued. I have not thought it desirable to swell the size of the volume with a collection of general forms, nor with any of the earlier Orders, as these things are to be found in many publications of reputation already before the Profession.

C. STEWART DREWRY.

77, CHANCERY LANE,
March, 1856.

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ERRATA.

An error as to orders of course to amend in pp. 12 and 15, is corrected in p. 81.

Also, an error as to the two clear days of service of notice of motion in p. 46, is corrected in p. 219.

THE
NEW PRACTICE
OF THE
COURT OF CHANCERY.

CHAPTER I.

OF THE PROCEEDINGS OF THE PLAINTIFF.

I. *Of filing, printing, and serving a bill, and of enforcing appearance thereto.*

A SUIT IN CHANCERY is commenced by filing a bill or a claim. I shall treat first of the commencement by bill, as that is the most usual, and with very few exceptions, the most useful course.

A bill may be drawn by the plaintiff's solicitor, and settled and signed by counsel, but as it must, in point of form, be *signed*, and must therefore practically be settled by counsel, the invariable practice is for the solicitor to instruct counsel to draw it. A bill properly drawn, according to the modern practice, should be, and should be no more than, a succinct and precise statement of the matters on which the plaintiff intends to rely in support of his case. The 15 & 16 Vict. cap. 86, sect. 10, directs that every bill of complaint to be filed in the court after the time therein appointed for the commencement of the act, "shall contain, as precisely as may be, a narrative of the material facts, matters, and circumstances on which the plaintiff relies, such narrative being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate and distinct statement or allegation, and shall pray specifically for the relief which the plaintiff may conceive

himself entitled to, and also for general relief; but such bill shall not contain any interrogatories for the examination of the defendant;" and the 14th Order of the 7th August, 1852, suggests a form of bill, to which any bill may be made similar, with such variations as the nature and circumstances of each particular case may require. (1) The bill is addressed to the Lord Chancellor, and is marked by the plaintiff's solicitor for either of the branches of the court, that is, for the Lord Chancellor, to be heard by one of the Vice-Chancellors, or for the Master of the Rolls; and thenceforth the cause becomes attached to that branch, unless removed to another branch by some special order of the Lord Chancellor: (1st Order, 5th May, 1837, and 2nd Order, 2nd November, 1850.)

It is very usual for the counsel, who draws the bill, to mark in the margin of the draft the Court to which he recommends the cause to be attached; and it would be in general prudent, for many reasons, for the solicitor to attend to his suggestion; however, it is the privilege of the solicitor, and not of the counsel, to select the court.

The bill commences by stating the name and address of the plaintiff; and then it states in paragraphs, numbered in such order as the pleader selects, subject to the general rule laid down by the 10th section of the statute above referred to, the facts and the documents, or the substance of the documents, out of which the plaintiff's claim grows. It should state the title of the plaintiff, positively and definitely; as, for instance, supposing him to claim as tenant in fee by descent, it should allege not simply that he is seised in fee, but that A. (the ancestor) being seised in fee, died intestate, leaving B., the plaintiff, his heir at law, and that the plaintiff is as such heir at law of A., seised in fee; or, supposing him to be tenant in tail under a settlement, it should not allege the title in those general terms, but should state that by a certain deed, lands, &c., were settled to the use of A. for life, with remainders in tail (following the statements of the settlement); and it should allege and show succinctly how the plaintiff is the particular person, in the events which have happened, who is the tenant in tail. In fact, not to multiply examples which would be infinite, the statement of the title should not be a mere general

(1) The General Orders, and the Forms annexed to them, together with such other forms as may be thought useful, will be set out in their places.

statement of the result, but a statement of such particulars as will enable the court to see for itself, that, assuming the facts alleged to be true, the plaintiff does really claim in the right which he alleges himself to possess.

The bill should then state the circumstances out of which arises the injury done to the plaintiff, and the particular injury of which he complains, and for which he seeks relief, and it should state generally the facts evidencing that wrong.

For instance, suppose the case of a tenant in tail in remainder subject to a life estate, with power to the tenant for life to grant leases for twenty-one years, and the tenant for life has granted improper leases for his own benefit; the bill, having stated the title, alleges that the tenant for life has improperly and fraudulently exercised the power, and granted an improper lease, namely, a lease by a certain deed at a rent of () £., taking, therefore, a fine to himself of () £.; whereas the land let is worth, it will allege, at a fair valuation, a rent of () £., if no fine had been taken. Under such an allegation the plaintiff would be able to go into evidence to prove the grant of the lease, the taking of the fine, and the true value of the land, if let without fine.

Formerly, after stating the plaintiff's title, and the injury done to him, by way of direct allegation, the bill used to indulge freely in what were called pretences and charges; viz., suggestions of all the imaginable defences that the defendant might in the view of the pleader set up, and then charges rebutting those pretences, and allegations of facts, by way of charge, displacing the pretences.

This part of an ancient bill is in modern bills almost wholly abandoned, as a useless incumbrance; all the statements of facts thought material are made by way of substantive allegation; and the bill at once proceeds to state what the plaintiff conceives and submits ought to be done; and the prayer is framed accordingly.

The prayer should state distinctly, yet as generally as may be, consistently with precision, what relief the plaintiff seeks; as for instance, in the case above put, that the lease may be declared fraudulent and void, and set aside, and delivered up to be cancelled; and if relief of various kinds, applicable to the several matters complained of, or if one of several kinds of relief in the alternative, is desired, the prayer is also divided into paragraphs.

The substantial part of the prayer of the bill always concluded formerly in practice, and now the prayer concludes

compulsorily, under the 15 & 16 Vict. cap. 86, sect. 10, referred to *ante*, p. 2, with a prayer for general relief. Of what use this portion of the prayer is, it is, very difficult to say, as the instances are very rare in which the court grants any relief other than that which the plaintiff specifically asks, or at any rate, a relief substantially growing out of it. However, it must be inserted.

The names of the defendant or defendants, if there are several, are inserted at the end of the prayer, and the draft must be *signed*, as already observed, by counsel.

A minute discussion of the different kinds of bills, and of the mode in which they should be framed, falls under the head of pure pleading, to which it is not intended to devote this portion of the work; and it may, therefore, be convenient at once to state, that in general only so much of the doctrines and rules of pleading will, in this part of the work, be noticed, as is deemed essential to enable the solicitor satisfactorily to instruct and confer with his pleader.

Before filing a bill, the solicitor of the intended plaintiff should be specially authorised to do so by his client (*Wright v. Castle*, 3 Mer. 12; *Wiggins v. Peppin*, 2 Beav. 403); and regularly he should have a written authority; for if the authority cannot be implied from acquiescence, and there is no written authority, and the plaintiff repudiates the suit, the solicitor will be put to prove the authority: (*Allen v. Bone*, 4 Beav. 493; *Pinner v. Knights*, 6 Beav. 174.) And if there be any doubt, the court will hold the solicitor liable. The liability that he incurs is that of personally paying the costs of dismissing the bill, as between solicitor and client, and of the motion made by the plaintiff for that purpose, also as between solicitor and client (*Allen v. Bone*, 4 Beav. *sup.*); and also of paying the costs, charges and expenses occasioned to the other parties to the suit, if it has proceeded so far as to charge other parties besides the plaintiff: (*Malins v. Greenway*, 10 Beav. 564.) If there are several plaintiffs, the authority of all must be obtained (*Hood v. Philips*, 6 Beav. 176); but if one of several plaintiffs has concurred in authorising a suit, and afterward he instructs the solicitor to take no further steps, he is not entitled to be indemnified against the solicitor for the further costs of the suit (*Winthrop v. Murray*, 7 Hare, 152); but if the client revokes the solicitor's authority, he proceeds afterwards at his own peril of costs: (*Freeman v. Fairlie*, 8 L. J. (N. S.) 44, Ch.)

The draft bill being prepared, the next step is to get it printed: (15 & 16 Vict. cap. 86, sect. 1.) It is printed on

royal writing paper, quarto, in pica type, leaded (1st General Order, 7th August, 1852), and the copy to be filed is to be interleaved with paper of the same description. The name of the counsel who signed the draft is printed at the foot of it; and to that are added the name and address of the plaintiff's solicitor, so describing himself. On the outside of the printed bill is indorsed the branch of the court to which it is attached, the title of the cause, the summons to appear, and the name and address of the plaintiff's solicitor. The form of the summons to appear is given in the schedule to the 15 & 16 Vict. cap. 86, in lieu of the subpoena to appear and answer, which were formerly in use, but are now abolished by the 2nd section of the 15 & 16 Vict. cap. 86. No bill, other than a printed bill, can now be filed except in the cases provided for, and under the conditions explained by the 6th section of the 15 & 16 Vict. cap. 86, which is as follows:—

Notwithstanding the provisions herein before contained, the Clerks of Records and Writs of the said court may receive and file a written copy of any bill of complaint praying a writ of injunction or a writ of Ne exeat regno, or filed for the purpose either solely or among other things of making an infant a ward of the said court, upon the personal undertaking of the plaintiff or his solicitor to file a printed copy of such bill within fourteen days, and every bill of complaint so filed shall be deemed and taken to have been filed at the time of filing the written copy thereof, and a written copy of any such bill of complaint, stamped as aforesaid, and with such indorsement therein as aforesaid, may be served on any defendant thereto, and such service shall have the same effect as the service of a printed copy. ⁽¹⁾

Slight alterations of mere clerical errors may, however, be made on the printed bill, in writing (*Yeatman v. Mousley*, 2 De G. Mac. & G. 220); but the alterations must not be extensive or important, or interfere with the legibility of the bill. (*Id.*, see the judgment.)

The printed bill being thus prepared, the next step is to file it, for which purpose it is taken to the office of the Clerks of Records and Writs, where it is left with the clerk, the alphabetical letter of whose division comprises the first

⁽¹⁾ See as to written bills the 2nd and 3rd Orders of the 7th August, 1852.

letter of the surname of the first of the plaintiffs, or of the sole plaintiff; the clerk will thereupon file it by putting it on the records of the court, and all subsequent proceedings in that office in the cause are to take place and be filed in the division in which the original bill is; although the surname of the plaintiff in any subsequent bill in the suit may not be the same as the surname of the plaintiff in the original bill.

The next step is to serve the defendant or defendants. The writ of subpoena to appear and answer is abolished by the 15 & 16 Vict. cap. 86, sect. 2, and in lieu thereof, the defendant must be served with a printed copy of the bill, with an indorsement thereon according to the terms of the schedule to the act already referred to, the bill being previously stamped by one of the Clerks of Records and Writs: (15 & 16 Vict. cap. 86, sect. 3.) The filing and service of the bill have the same effect as the filing of a bill and issuing and serving subpoena under the old practice: (15 & 16 Vict. cap. 86, sect. 4.) Service of the bill must be effected in the same manner as service of subpoena to appear and answer formerly were, except that it is not necessary to produce the original bill; and that the court may direct substituted service in such manner and cases as it may think fit: (15 & 16 Vict. cap. 86, sect. 5.)

The service must therefore be of a printed copy of the bill upon the defendant or defendants, either personally or by leaving it at the place of actual residence. When, however (as is generally the case), the defendant has appointed a solicitor, who has undertaken to appear and act for him, the printed copy of the bill is usually served on the solicitor. The service on the defendant's solicitor may be made either by delivering the printed copy of the bill to him personally, or by leaving it at his office in the hands of one of his clerks. If there are several defendants, the directions above given in reference to a sole defendant must be followed as to each separate defendant. ⁽¹⁾

If the defendant, not having appointed a solicitor to act for him, absconds or keeps out of the way for the purpose of avoiding service, then the plaintiff's solicitor must proceed, in the way hereafter pointed out, to substituted service.

If a defendant, being regularly served with the bill, does not enter an appearance within the time prescribed by the

⁽¹⁾ The details of the rules affecting the service of proceedings according to their nature, and the character of the person served, will be pointed out in a separate chapter.

If the sheriff does take the defendant, and the defendant clears his contempt by entering an appearance and paying the proper costs, the cause may then go on regularly. But if, instead, he is contumacious, the plaintiff, although he may keep him in prison for the contempt of the court, has no power to compel him to enter an appearance, and must proceed, under the 29th Order of May, 1845, himself to enter an appearance for the defendant, that is, if the defendant is neither an infant, nor a person of weak or unsound mind, and has been duly served with the printed copy bill within the jurisdiction of the court. In each of these cases the proceeding is different.

I have assumed, hitherto, that the defendant or his solicitor has been regularly served with a copy of the bill. But it happens, sometimes, that a defendant does not either appear or appoint a solicitor to act for him, but absconds or keeps out of the way, so that, in fact, he cannot be found for the purpose of serving him with a copy of the bill. The 5th section of the 15 & 16 Vict. cap. 86, gives the court an apparently very unlimited power applicable to this case, by providing that "it shall be at liberty to direct substituted service of the printed bill or claim in such manner and in such cases as it shall think fit." I am not aware of any case except *Hope v. Hope*, *infra*, determined since the statute, upon the question to what extent the court will act under this section; it is, however, presumed that it will be governed in exercising the jurisdiction by the same rules which governed its application of the general power, which it had before the statute, to give leave for substituted service of the subpœna to appear and answer. It will be convenient, therefore, here to refer to the principal cases on that subject.

Substituted service of subpœna to appear and answer a bill of revivor has been ordered on the solicitor who appeared for the defendant to the original bill (*Norton v. Hepworth*, 1 Mac. & Gor. 54); but the court has refused to grant substituted service on solicitors who had acted for the defendant in several *other matters*, although some of them related to the subject-matter of the particular suit: (*Hurst v. Hurst*, 1 De G. & S. 694); on the other hand, where the defendant has given a special authority to a person to act for him with respect to the property, the subject of the suit, the court has ordered substituted service on such agent: (*Murray v. Vipart*, 1 Phil. 521; *Hobhouse v. Courtenay*, 12 Sim. 140.)

The cases on this subject are numerous, and not easily

reconcilable. The general principle to be collected from them seems, however, to be this: that the court will order substituted service when it is reasonably satisfied that the defendant has either *actually* authorised, or is, in fact, represented by the person on whom substituted service is sought; or that *through him* the defendant will be *de facto* apprised of the steps for which service is made; but that the court will not grant substituted service, unless it is so satisfied. ⁽¹⁾

The proceedings under the 29th Order of 1845 must formerly have been within three weeks from the time of the service of the subpœna, and it is presumed it must be now within the same period from the service of the printed copy bill; and the appearance for the defendant will be entered by the Clerk of Records and Writs on production of the affidavit of the service, without any order. But if the three weeks are allowed to elapse, the plaintiff must apply to the court for leave to enter an appearance. This application, if made within reasonable time, is made by *ex parte* motion; but if there has been delay, not satisfactorily explained, the court requires notice of the motion to the defendant, or that fresh service of the subpœna should be made; or otherwise it will give only a qualified and conditional order: (*Bradstock v. Whatley*, 7 Beav. 346; *Totty v. Ingleby*, 7 Beav. 591; *Morgan v. Morgan*, 1 Col. 228.) The order for leave to enter an appearance, when made by the court, must be drawn up; and for that purpose the affidavit of service, and the certificate of the Record and Writ Clerk of the defendant having entered no appearance, must be left with the registrar. After this is done, the plaintiff may proceed with the cause as if the defendant had appeared.

The plaintiff may elect to take at once, if he thinks fit, this course of entering an appearance for the defendant, when the defendant refuses to appear, instead of issuing an attachment against him. Mr. Sidney Smith in his *Handbook of Practice*, p. 137, observes, I think with great correctness, that "since the Orders of 1845 appear to provide a more complete remedy against a defendant neglecting or refusing to appear, and since no effectual proceedings can be followed after the issue of an attachment for want of an appearance, the practitioner should be cautioned against the

⁽¹⁾ I am informed that in a case of *Hope v. Hope*, a case recently determined at the Rolls, but not yet reported, the Master of the Rolls has laid down the principle as above stated.

latter mode of procedure." In fact, however, attachment, or the threat of attachment, is still used in practice as the most convenient course against any defendant who may reasonably be expected to defend, as such defendants, in consequence of the issue or even the threat of an attachment, commonly bring their contumacy to a close.

When the defendant not only avoids service of the bill, but continues to keep out of the way, or to be *de facto* inaccessible, the plaintiff is obliged to proceed throughout, as it were, *ex parte*, by taking the bill *pro confesso*, and proceeding to a decree founded upon that assumption. This course of exceptional proceeding will be treated of in detail in its place.

Assuming the defendant to have appeared regularly by his solicitor, the plaintiff's solicitor must next deliver to the defendant's solicitor, on his application for the same, as many copies of the printed bill, not exceeding ten, as he may require, on being paid for the same at such rate as prescribed by any General Order: (15 & 16 Vict. cap. 86, sect. 7, and 5th and 6th Order, 7th August, 1852.)

The payment is at present fixed at one halfpenny per folio: (6th General Order of the 7th August, 1852.)

II. *Of preparing, filing, and serving interrogatories.*

When it is intended by the plaintiff that the defendant should answer the whole or any portion of the bill, interrogatories addressed to the matters on which an answer is required, must be prepared and delivered to the defendant's solicitor within eight days after the time limited for the defendant to appear: (17th Order, 7th August, 1852.)

The interrogatories are usually *prepared* in draft by counsel. It is presumed, from the form given in schedule (C), of the Orders of the 7th August, 1852, that they ought to be *signed* at any rate by counsel; and the invariable practice is for the plaintiff's solicitor to instruct his counsel to prepare them on such points as he may think advisable; for which purpose he lays before him a copy of the bill, and of such documents as are referred to, but not set out in the bill.

On the preparation of interrogatories no specific rules will be here laid down; as that subject also falls within the department of pure pleading. It may, however, be stated generally, that they should interrogate the defendant minutely as to the facts alleged, to which an answer is required, in such a manner that he cannot, if he speaks the truth, evade answering the whole substance of the allegations; as,

for instance, if the allegation is that the defendant "on a certain day felled and cut down divers large trees, and certain saplings," on the land of which he was tenant for life, the interrogatory would be "whether he did or not on that day, or on some other and what day, fell and cut down, or fell or cut down, divers or some, and how many, large trees, or divers or some, and what trees, and of what kind," &c. A general form for interrogatories, is given in Schedule (C.), to the General Orders of the 7th August, 1852.

The interrogatories being prepared in draft, are copied on paper, and must be taken to the Record Office to be filed, and then a copy, duly stamped, and which must be marked by the Record and Writ Clerk as an office copy (17th Order, 7th August, 1852), must be delivered to the defendant's solicitor, either personally or by leaving it at his office (*Bowen v. Price*, 22 L. J. 179), as stated above, within eight days after the time when the defendant ought to enter an appearance to the bill. Interrogatories may be filed by leave of the court before the filing of the printed bill, where a *written* bill has been regularly filed under the exception in the 6th section of the 15 & 16 Vict. cap. 86: (*Lambert v. Lomas*, 16 Jur. 1008.) But if interrogatories are not filed within the regular time, they cannot be filed without special leave of the court to be applied for on notice of motion: (20th General Order, 7th August, 1852.)

It has been stated that the defendant must appear as required by the summons indorsed on the bill, within eight days after service of the copy of the bill, exclusive of the day of such service; but if the day on which the appearance should be entered expires on a Sunday, or any other day on which the office is closed, he may enter his appearance on the following day, and the appearance is to be held as good as if entered on the preceding day.

When the defendant has appeared, he has twelve days from the date of his appearance (16th Order, May 1845, Art. 10) to consider whether he will demur merely to the bill, not pleading or answering, either wholly or in part; the twelve days are exclusive of the day on which the appearance is entered: (11th Order, 1845.) A demurrer may be, speaking generally, either for want of equity in the bill, viz., for some cause which, if held good, will put the bill as framed, out of court; or for want of parties, or for some other ground which will only partially affect the validity of the bill: in either case the course of practical proceedings for the plaintiff, in order to dispose of the demurrer, are the same.

III. *Of the plaintiff's proceedings when the defendant demurs.*

On a demurrer being filed, the defendant's solicitor gives notice thereof to the plaintiff's solicitor, who thereupon proceeds to the Clerk of Records and Writs Office, and obtains a copy of the demurrer. His first step should then be, *in all cases* where the demurrer goes to the whole substance of the bill and not merely to parties or to some matter partially affecting the relief asked, to consult his pleader, previously to determining whether to submit to the demurrer without having it argued or to set it down for argument. For frequently there may be grounds, where the demurrer is to the substance of the bill, which have escaped the attention of the plaintiff's counsel (whose mental bias is to make a case); and which, having been detected by the defendant's counsel (whose mental bias is exactly the other way, viz., to try to discover that there is no case), may, when called to the attention of the plaintiff's counsel, make it prudent, in his opinion, either to submit to the demurrer conclusively, or to submit to it for the purpose of amending the bill. And when the demurrer is for want of parties, it is generally also prudent in the first instance to consult counsel, because the question who are necessary parties is one of pure pleading. The difference between submitting to a demurrer at once, and having it allowed on argument is this, that if it is submitted to at once, and the proper costs, fixed at 20s., are paid by the plaintiff, he has, *as of course*, a right to amend his bill; but if the demurrer is argued, and allowed by the court on argument, the court may, or may not, at its discretion, after disposing of the demurrer, give leave to amend the bill. And if it does give leave, it will only be on the terms of the plaintiff paying taxed costs. If a demurrer is submitted to finally, before it is set down, and the plaintiff wishes to put an end to the suit without incurring further expenses, his course is to dismiss his bill at once with costs. If the plaintiff submits to the demurrer on account of some existing but curable defect in the bill, and wishes to proceed with the suit, he obtains as of course an order to amend the bill: this order is now had on a summons in the Judge's chambers, which is obtained on application to the Judge's chief clerk. It may be obtained, notwithstanding the 5th General Order of the 16th October, 1852, without notice, as that order only applies to orders which can be opposed; but the order must be served.

The subject of amending bills generally will be more fully discussed in its place.

If the demurrer is not submitted to, but is intended to be argued, and if the defendant does not set it down, the plaintiff must set it down to be argued, if it is to the whole bill, within twelve days from the date of its being filed (46th Order, 8th May, 1845), and if it is to part of the bill, within three weeks from such date (47th of the same orders), otherwise the plaintiff will be held to have submitted to it.

A demurrer to the whole bill is, when it goes to the whole equity, so that, if allowed, there remains no ground whatever for relief. A demurrer to part of the bill is, when it is either for want of parties, or for the presence of improper parties, or to some particular portion of the equity; so that, allowing it, there still remains some ground for relief.

For the purpose of setting down a demurrer to be argued, the times of vacation are not to be reckoned (14th Order, 8th May, 1845); and if the day on which the demurrer should be set down is a holiday, and the Registrar's Office is shut, the demurrer will be regular if set down on the following day: (13th Order, 8th May, 1845.) To set down a demurrer, the plaintiff must present a petition of course, addressed to the Lord Chancellor, or Master of the Rolls (but it is usually presented at the Rolls): this petition is taken to the office of the secretary of the judge, and at the Rolls it is answered at once by the secretary; if addressed to the Lord Chancellor, it is answered in due course. The petition is filed in the secretary's office: it should state for what court the bill is marked: (5th Order, 5th May, 1837.) A copy of the bill and demurrer should be also left, at the time of presenting the petition, with the secretary of the judge before whom it is to be heard; upon the petition being answered, it must be taken to the Registrar's Office, and thereupon an order is drawn up, which must be regularly passed and entered, and then the Registrar will enter the demurrer in his book, and give the solicitor a note of the day on which it is to be in the paper. Demurrers are put in the paper for argument two clear days after they are set down; the plaintiff's solicitor should, therefore, immediately after it is set down, serve the defendant's solicitor with a copy of the order for setting it down, as the defendant's solicitor is entitled to *two clear days'* notice of the demurrer being in the paper for hearing.

When the demurrer has been thus set down, the plaintiff's solicitor should, without delay, deliver his briefs to counsel. The brief consists of a brief copy of the bill and

demurrer; no other papers are requisite, except such observations as the solicitor may think fit to append by way of observations, not exceeding one or two brief sheets; nor will any other papers be allowed on the taxation of costs. For the argument of a demurrer a brief is usually, and, if the case is of any importance, should always, be given to leading as well as to junior counsel; and, as a general rule, it may be here observed that, whenever it is usual or fit to instruct two counsel, it is also fit and prudent to have a consultation before bringing the case on in court; and whenever two briefs are allowed on taxation, a consultation will also be allowed. The consultation is held at the chambers of the senior counsel, and should always be attended by the solicitor. Whenever the demurrer is what is technically called "in the paper," that is, in the list of business marked in the court paper to be heard on that day, the solicitor of the plaintiff should attend the court personally, or by some competent clerk, and watch for the case coming on to be heard, and he is entitled in costs to charge for such attendance. He should be provided with an office copy affidavit of service on the other side of the order, setting down the demurrer, as sometimes the opponent does not appear.

If the opponent does not appear, that is, if he has not instructed counsel, and the plaintiff's solicitor produces his affidavit of service, the plaintiff will be entitled to take an order overruling the demurrer with costs; if he has not such affidavit, no order is made, but the demurrer will be simply struck out of the paper, and may then be again regularly put in the paper on the application of either party. When the demurrer is called on, the manner of disposing of it is as follows:—the leading counsel for the defendant opens the case, usually by reading the bill, unless it is of great length, in which case he contents himself with reading the particular parts of it which contain the alleged equity, and to which the demurrer is put in. He then argues the ground of demurrer, and is followed by the defendant's junior counsel, who makes such further comments, if any, as his experience suggests.

The plaintiff's leading and junior counsel then follow in the same order, rebutting the arguments of the defendant, and showing the equity of the bill.

The defendant's counsel replies, and the court then gives judgment. If it allows the demurrer *simpliciter*, it is with costs of the suit, if the demurrer is to the whole bill; and of the demurrer, if it is only to part of the bill: (45th

Order, 8th May, 1845.) The costs are, however, in the discretion of the court. The court may, as already observed, in allowing the demurrer, give liberty to the plaintiff to amend; this is entirely in the discretion of the court, and whether it will give liberty to amend or not, depends on whether it sees that the plaintiff may have in reality a case, though he has improperly presented it to the court, or whether it sees that the vice of the bill is inherent in the nature of the case, and is therefore ineradicable by any conceivable amendment, in which case the court will not suffer the defendant to be harassed by what it deems a proceeding which can in no view be beneficial to the plaintiff, and will refuse liberty to amend. Such a case does not, however, often occur.

When a demurrer is submitted to at once without setting it down, with a view to amend the bill, or when it is allowed on argument with liberty to amend, the plaintiff's solicitor obtains an order of course to amend, upon payment of 20s. costs, as already pointed out, if the demurrer has not been set down; and of the taxed costs if it has been allowed without any direction as to costs, or of the costs directed by the court, if a special direction has been given. Although, as before pointed out, the order to amend is granted and drawn up by the judge's clerk, it must be entered at the Registrar's Office, as if it were an order made in open court: (28th Order, 16th October, 1852.) When the bill is to be amended, the plaintiff's solicitor lays before his counsel the bill and demurrer, and the instructions which were originally furnished for preparing the original bill, and such further information as may be thought material by way of instructions to amend the bill. The amended bill, like the original bill, is usually prepared and *must* be signed by counsel. If the amendments do not exceed in any one place two folios in length, they may be made in writing on the printed bill, on the file of the court; for which purpose the plaintiff's solicitor furnishes one of the Clerks of Records and Writs with a fair copy of the printed copy of the bill as amended by counsel, that is, a printed copy, with the amendments written in ink. The signature of the counsel must be copied on every copy so amended. The 7th Order of the 7th August, 1852, applies only to amendments not exceeding two folios in length: (*Stone v. Davies*, 17 Jur. 585.) If the amendments are so made, the defendant must be served with a fresh copy of the printed bill with the amendments, and as many such copies must be furnished to him as he was entitled to require of the original bill, and upon similar

terms; the signature of the counsel to the amendments must be copied on every such amended printed bill. If the amendments exceed the length of two folios in any one part, the amended bill, that is, the whole bill as amended, must be reprinted, and the same process must be gone through in serving a copy of it on the defendant's solicitor, as has been pointed out with respect to the service of the copy of an original bill.

If the plaintiff desires an answer to the amendments, he must file fresh interrogatories, and it is presumed they must, as in the case of interrogatories to any original bill, be filed, and copies delivered within eight days after the time when the defendant ought to appear to the amended bill. It is scarcely necessary to observe that an amended bill may be demurred to in the same way and on the same grounds as an original bill, and the same course of proceedings is adopted on the part of the plaintiff, in meeting and disposing of a demurrer to an amended bill, as in treating a demurrer to an original bill.

IV. *Of the plaintiff's proceedings when the defendant pleads to the bill.*

The defendant, instead of defending by demurrer, may elect to defend by plea. A plea may shortly and very generally be explained to be a statement by the defendant of some document, or some fact, not appearing upon the face of the bill, which of itself displaces the whole or a part of the equity of the bill, and absolves the defendant from the liability to answer. If the defendant pleads, when his solicitor has filed the plea in the office of the Clerk of Records and Writs, he gives notice, on the same day on which it is filed, to the plaintiff's solicitor, who then proceeds as nearly as possible as in the case of a demurrer. His first step, having obtained a copy of the plea from the Clerk of Records and Writs, should *always* be to lay a copy of the plea and the bill, and such further information as the matter pleaded may show to be necessary, before his counsel, to advise whether the plea should be submitted to or set down for argument.

Either party may set down a plea for argument immediately on its being filed. If, therefore, the plaintiff elects to submit to the plea, he must do so before the defendant has set it down, if he wishes to avoid the costs of setting it down; for if he submits before it is set down, desiring to amend, he pays only 20s. costs, and can obtain an order of

course to amend. But if he has allowed it to be set down, and then submits to it, he must pay 5*l.* in addition to the 20*s.*: (*Lopes v. De Tastet*, 3 Mad. 183; *Vernon v. Cue*, Dick. 358.)

If the plea is submitted to, the plaintiff pays, as above mentioned, 20*s.* costs, and may then obtain an order to amend his bill as of course. But whether he will do so, must depend upon the nature of the plea. If the plea is only to show want of parties, or to show some defects which can be remedied, the plaintiff will amend his bill. If the matter brought forward by the plea is such as to show that the plaintiff not only has not, in the existing state of the pleadings, a sufficient case, but cannot make one, that is, cannot, by any facts to be alleged by amendment and capable of proof, rebut the effect of the matter pleaded, then the plaintiff should at once, to avoid further expense, dismiss his bill with costs.

If he is advised that the plea should be argued, he should, within three weeks after the filing of the plea, set it down for argument. If he does not, the plea will be held good, as if it had been held good on argument (16th Order, 8th May, 1845, Art. 19), and the plaintiff will then have to pay the costs referred to by the 48th Order, 8th May, 1845, viz. the costs of the plea, and if it is to the whole bill, the costs of the suit. A plea is set down for argument in the same way as a demurrer, viz., by presenting a petition of course for the purpose, stating for what court the bill is marked, and getting the order made thereon drawn up and served, and leaving it with the Registrar to be set down, as with respect to the order for setting down a demurrer. A plea is, like a demurrer, put in the paper for hearing two days after it is set down; and therefore the party setting it down must serve the order for setting down on the solicitor on the other side, immediately on obtaining it. In arguing a plea, the same course is also pursued as in arguing a demurrer, namely, the counsel for the plea opens the case by reading the bill, or portions of it, and the plea, and then arguing on the effect of the plea as a defence to the matter alleged by the bill. Then the counsel for the bill follows, and the leading counsel for the plea replies.

If the plea is allowed, it is generally with costs; that is, unless the plaintiff undertake to reply to the plea, or the court orders to the contrary (48th Order, 8th May, 1845.) If it is overruled, the defendant always asks for time, and the court fixes a time within which he must answer. If the plea is allowed, then it is for the plaintiff to endeavour to

obtain leave to amend, which the court usually grants, if it thinks that the case is capable of being mended by additional facts. But if the plea, from its very nature, is such that no imaginable alteration of the facts can, in the opinion of the court, entitle the plaintiff to the relief he asks, respecting the matter pleaded, then the court will refuse liberty to amend: and in that case the order allowing the plea also directs the dismissal of the bill (48th Order, 8th May, 1845.)

It must be here observed, that a plea may be in some instances resisted without reference to any defect either of form or of substance. For instance, if the defendant has allowed the time to answer to elapse, and is in contempt, that is, if attachment against him has been issued for not answering, it is irregular for him to file a plea without first tendering the costs of the contempt: (*Foulkes v. Jones*, 2 Beav. 274.) So, after the overruling of a demurrer, a plea filed without leave of the court is irregular (*Rowley v. Eccles*, 1 Sim. & Stu. 511), and it cannot be filed until the demurrer is actually taken off the file: (*Cust v. Boode*, 1 Sim. & Stu. 21.) Nor can a defendant plead after obtaining time to answer, and not having answered: (*Newton v. Dent*, Dick. 234.)

A defendant is sometimes allowed to amend his plea either before or at the hearing of it. But it is not of course that he should obtain leave; he must, if desiring leave to amend before the hearing, do so by a special application by motion; and whether the leave be so asked, or at the hearing, the intended amendments must be stated.

A plea is sometimes, at the hearing, ordered to stand for an answer; and either with or without liberty to except for insufficiency. If it is with liberty to except, the plaintiff is entitled to costs (*Howling v. Butler*, 2 Mad. 245); but if nothing is said about liberty to except, the plaintiff cannot except to so much of the answer as is comprised in the plea: (*Sellon v. Lewen*, 3 P. Wil. 219.)

The defendant may, instead of pleading alone, elect to plead and answer; that is, to plead to some matter in the bill, and to answer the rest. If he does this, there is no difference in respect to the plaintiff's course for setting down and arguing the plea, except that at the hearing the counsel are furnished with copies of the answer as well as of the plea, and the answer may be read as evidence by the plaintiff against the allegations of the plea.

When the plaintiff simply sets down a plea for argument and does not reply to it, he admits, for the purpose of the

argument of the plea, the truth of the allegations of the plea as matters of fact, and contends only either that it is bad in point of form; or that it has not, admitting it to be true, the effect for which it is used. But if he disputes the truth of the allegations contained in it, he may reply to it, as if it were an answer, before it is set down; or, at the hearing, he may undertake to reply to it. The plea is then in fact treated as in the nature of a sufficient answer, and evidence is gone into for and against it; and when the evidence is completed, the cause is set down as if the bill had been answered. It must not be understood that such a hearing of the plea is conclusive of the right so far as it is affected by the matter contained in the plea. If the plea is supported by the evidence, it is a good bar to so much of the suit as it affects, and that although it may be bad in point of form or of substance; for the plaintiff, by replying to it, instead of arguing its effect, admits its validity as a plea.

A plea of outlawry, or of a former decree, or of an existing suit for the same objects, should not be set down; the first, because its truth cannot be disputed; the second, because if the plaintiff sets it down, he admits the fact of the two suits being for the same matter. In the latter case, the plaintiff's course was, under the old practice, to obtain by an order of course a reference to the master, to examine whether the suits were for the same matter. But now it is apprehended that the court would direct an inquiry of the same nature in chambers before his chief clerk. ⁽¹⁾

V. *Of the plaintiff's proceedings when the defendant defends by answer.*

The most usual course in a substantial suit is, for the defendant to defend by answer, as it only occasionally occurs that a plaintiff's case is so bad in itself, or so badly pleaded in the bill if good in itself, as to justify a demurrer; and demurrers, therefore, are usually filed only in suits in which the sole object is to take the opinion of the court on a point of law, raised intentionally on the face of the bill. And as for pleas in general, except in plain cases, such as a clear release of the plaintiff's demand, or some document or fact unknown to the plaintiff, clearly and entirely rebutting

⁽¹⁾ The course of proceeding, when inquiries of any kind are directed, falls properly within the subject of proceedings after order or decree in chambers, and will be discussed in its place.

his demand, it may be remarked that to defend by plea is a course of proceeding so difficult, and it may be added so seldom complete, and so often wholly fruitless, that experienced practitioners very seldom resort to it.

If then the defendant elects to defend by answering, and the plaintiff has filed interrogatories, the defendant is bound to answer within *fourteen* days from the time when a copy of the interrogatories has been delivered to him or to his solicitor. Most frequently he does not answer within that time, but obtains from the judge's chief clerk in chambers further time.

The details of this procedure belong properly to the subject of defence, and will be treated of hereafter.

If the defendant does not answer within the time originally prescribed, or within such further time as he obtains for answering, the plaintiff is entitled to issue an attachment against him; or he may file a traversing note under the 52nd and subsequent Orders of May, 1845; or he may proceed to take the bill *pro confesso*, under the 76th to the 80th of the same orders. If the plaintiff elects to proceed by attachment simply, he prepares and sues out an attachment in the same manner as for want of appearance, except that the application need not be supported by an affidavit of no appearance having been entered. The execution of the attachment consists, as in the case of an attachment for want of appearance, in delivering it to the under-sheriff, or proper officer of the county in which the defendant resides, whose duty it is to take the defendant into custody. If he succeeds in doing so, and takes bail, and makes his return accordingly, the plaintiff may then proceed by moving the court, that the messenger of the court do bring the defendant to the bar of the court to answer his contempt. This is a motion of course, and the order will be made on production of the attachment and the sheriff's return. The plaintiff must cause the defendant to be brought by the messenger to the bar of the court, to show why he does not answer, within ten days after he has been taken into custody; otherwise he will be entitled to be discharged without payment of the costs of his contempt, and the plaintiff will have to pay them (73rd Order, May, 1845); but the plaintiff may, if the defendant does not answer within eight days after such discharge, issue a new attachment. Under the old practice, when the defendant was thus brought to the bar of the court, the plaintiff's counsel was entitled to move for, and obtained, as of course, an order to commit him to the Queen's prison. But he was always examined by the court to ascer-

tain why he did not put in an answer ; and if he stated that by reason of poverty he was unable to employ any professional person, the court directed an inquiry by the master to ascertain whether that statement was founded on fact. If the master's report supported the defendant's statement, the court assigned to him a solicitor and counsel ; but if the master's report was against him, then the plaintiff proceeded to take the bill *pro confesso*. The 10th section of the 15 & 16 Viet. cap. 80, directs that after Michaelmas Term, 1852, "no reference shall be made to any of the masters in ordinary of the court, except in cases in which, from some previous reference made in the cause or matter, or in some other matter or cause connected therewith, the court may think it expedient to make such reference." This section, and the 11th and 26th of the same act, and the practice which has grown up under them of not merely in general directing inquiries in chambers instead of before the master, but of the judge disposing at once of many matters of inquiry in open court, to save time and expense, will, it is apprehended, somewhat vary the practice. It is presumed that the court will now frequently, if not usually, when the defendant is brought to the bar in the custody of the messenger, satisfy itself without directing an inquiry, by requiring the defendant to state on oath the circumstances on which he founds his allegation of inability from poverty ; that if satisfied of his inability, it will at once make an order assigning to him solicitor and counsel, and by the same order, direct the issue of a *habeas corpus*, and that the Clerk of Records and Writs do attend with the record on the return of the writ, in order that the bill may be taken *pro confesso* against him, unless he do in the mean time answer (*Welford v. Daniell*, 9 Sim. 652) ; or that, if not so satisfied, it will then make the order, simply handing him over to the Queen's prison. If the court, instead of taking that course, desires an inquiry, the order for committing the defendant to prison will be made as under the old practice, and an inquiry in chambers will be also directed. The inquiry will be conducted in the following manner :—The solicitor for the plaintiff leaves at the judge's chambers a copy of the order directing the inquiry (which being an order of the court must be regularly drawn up like any other order), duly certified as a true copy (17th Order of 16th October, 1852), and will then take out a summons under the 18th of the same orders ; the defendant must be served with notice of the order and the summons, and the defendant will then, on attending, either bring in an affidavit

verifying his statement, or be examined on interrogatories or *vivâ voce*, as the judge may direct. If he is to be examined *vivâ voce*, his examination will properly be the examination in chief, and the plaintiff's solicitor may cross-examine him. If he brings in an affidavit, the plaintiff will be entitled to cross-examine him on that affidavit (26th Order of 16th October, 1852.)¹ The chief clerk will make his certificate to the judge of the result of the inquiry; and the plaintiff will prepare a copy thereof, under the 46th of the same orders, and procure it to be signed by the chief clerk, and, after the expiration of four clear days, by the judge: (49th Order of 16th October, 1852.) If no summons is taken out in the meanwhile by the dissatisfied party, by way of appeal to the judge, on the certificate of the clerk, so approved, the plaintiff will proceed as he would have proceeded under the old practice, on the master's report or certificate.

When the defendant, being found by the judge, or certified by the chief clerk, not to be of inability, persists in not answering, and has been committed to prison, the plaintiff must apply by motion, on production of a certificate from the keeper of the prison, for a *habeas corpus cum causis* directed to the keeper of the prison, to bring up the body of the defendant to the bar of the court to answer his contempt. The return of the writ of *habeas corpus* must be at least twenty-eight days from the day of the commitment of the defendant (1 Will. 4, cap. 36, s. 15, rule 2.) The order being made, the solicitor prepares a writ of *habeas corpus* (the form of which is set forth in the Appendix), which will be sealed at the Writ and Record office, on production of the order and the præcipe. The plaintiff's solicitor lodges the writ with the keeper of the prison; the order for a *habeas corpus* also usually directs that a Writ and Record Clerk do

¹ It may be here observed that now, as a settled rule, the judges' clerks are not permitted to be attended by counsel; consequently, whenever the solicitor of the plaintiff to a suit desires that any examination taken in chambers should be conducted by counsel, must apply to the judge to hear the examination. In principle, all orders made in chambers are, in fact, the orders of the judge, although for convenience the parties in an immense variety of cases dispense with a formal attendance before the judge himself, and dispose of their business before the chief clerk. But the judge is always accessible; and if any of the parties desire to go before him, it is the practice to give them an opportunity of doing so directly: (*Hayward v. Hayward*, 1 Kay. App. 31.)

attend with the record of the bill, in order that the same may be taken *pro confesso*. On the day of the return of the writ, the Writ and Record Clerk attends in court accordingly; and if the defendant has not in the mean time put in his answer, and remains still contumacious; the plaintiff, by his counsel, moves that the bill be taken *pro confesso*, which is ordered at once: (see *Simmons v. Wood*, 2 Hare, 644.)

If the plaintiff prefers, instead of adopting this course, to file a traversing note, he may do so under the 52nd Order of May, 1845 (the form of the note is given in that order); a copy of the note must be served on the defendant, under the 19th or 21st Order (as the case may require) of October, 1842: (and 56th Order of May, 1845.) The effect of a traversing note duly served is the same as if the defendant had filed a full answer traversing the whole bill, on the day on which the note was filed (57th Order, May, 1845), and the cause can then regularly proceed. It is obvious that the course of filing a traversing note can only be usefully resorted to when the plaintiff is independent of discovery by the defendant; that is, when he can rely entirely on proof of the allegations of his bill.

The plaintiff, when the defendant has been taken into custody, has still another course open to him. Instead of committing the defendant to prison, and then proceeding by *habeas corpus*, as above pointed out, to take the bill *pro confesso*, he may, instead, proceed under the 76th Order of May, 1845, by moving against the defendant upon notice immediately after the execution of the attachment, at any time within three weeks thereafter, that the bill may be taken *pro confesso*, and on the motion being heard, the court may order the bill to be taken *pro confesso* immediately or upon terms as to time or otherwise. This order is, however, only a preliminary order, and the cause must, nevertheless, be set down; usually it is ordered to be set down by the court on a given day.

If the sheriff has not been able to take the defendant and makes his return accordingly, the plaintiff may, under the Orders of the 8th May, 1845, commencing with the 77th Order, proceed to take the bill *pro confesso* against him. If due diligence to execute an attachment has been used, so as to bring the defendant within the 77th Order as an *absconding defendant*, and if the defendant has appeared in person, or by his solicitor, the plaintiff serves on the defendant, or his solicitor, a notice that on a day named in such notice, being not less than fourteen days after service of the notice, the court will be moved to take

the bill *pro confesso*, and if the court is satisfied on hearing the motion that the defendant is within the 77th Order, it will make an order to take the bill *pro confesso* (78th Order of May, 1845.) Notwithstanding this preliminary order, however, the cause is set down on a subsequent day, and the defendant may then, waiving all objections to the regularity of the decree, but not otherwise, be heard to argue on the merits shown by the bill: (82nd Order, May, 1845.) As the court must be satisfied upon the facts before it will make an order under the 77th Order cited, the motion must be supported by an affidavit of merits, and the affidavit should be made by the sheriff's officer charged with the execution of the writ (*Yearsley v. Budgett*, 11 Beav. 144), as it must be shown that he has used due diligence.

Or the plaintiff may, on the sheriff's return *non est inventus* to an attachment, and upon affidavit that due diligence has been made in endeavouring to execute the writ, proceed by writ of *sequestration* to take the bill *pro confesso*: (9th Order of August, 1841.) The writ of sequestration must be founded on an Order which is obtained on motion of course, on production of the sheriff's return, and an affidavit bringing the case within the 9th Order of 1841. But the writ must be prepared by the solicitor like other writs, and like those must be sealed by a Clerk of Records and Writs.

If the plaintiff cannot procure an affidavit to be made to satisfy the exigency of the 9th Order of 1841, it is open to him to move, on the return of the sheriff *non est inventus*, that the Serjeant-at-Arms do take the defendant; and if the Serjeant-at-Arms takes him, the same subsequent course is pursued as if he had been brought to the bar by a messenger. If the Serjeant-at-Arms cannot succeed in taking the defendant, and makes his return accordingly, then on production of an office copy of his certificate, which is obtained at the Record Office, the plaintiff may move, as of course, and will obtain an order for a sequestration.

The consequence of obtaining an order for sequestration is, that the plaintiff may at once move, as of course, to take the bill *pro confesso*. The above is a general statement of the proceedings which must be adopted by a plaintiff to compel an answer, or to put himself in the same position, as nearly as may be, as if an answer had been put in. The details of the variations in procedure, consequent upon special circumstances, or special qualifications, or disqualifications, of the parties, will be treated of in separate chapters.

VI. *Of exceptions to answers.*

Supposing none of these difficulties to occur, and assuming the defendant regularly to have answered, the plaintiff is then to see that the answer is sufficient, that is, that it substantially answers all the interrogatories. For this purpose, he obtains from the Writ and Record Office an office copy of the answer, a brief copy of which he should without delay make and lay, together with a copy of the bill, before his counsel, to advise whether the answer is sufficient. If it is not, the plaintiff may take exceptions to it, and require a further answer.

In modern practice, it is not very usual to except to answers, unless they are grossly insufficient on some really substantial point; because, if they are insufficient on the question of what books and papers are in the power of the defendant (which is the most frequent subject of insufficiency), the plaintiff has a quicker and more efficient course open to him by requiring the defendant to bring in to the judge's chamber an affidavit of what books, papers, &c., are in his possession or power; and as to other matters which may rest peculiarly in the defendant's knowledge, the plaintiff may examine the defendant as a witness in the cause. Hence, exceptions are now much discouraged, as tending rather to useless expense and delay than to forward the purposes of justice. However, as they are not abolished, it is necessary to state the proceedings upon them.

The question what is a sufficient answer, is one of pure pleading, and will not here be discussed. Exceptions are usually drawn by counsel, and may be taken off the file if they are not so signed: (*Yates v. Hardy*, Jac. 223.) When the draft has been obtained from counsel, a copy of it is made on unstamped paper, and indorsed with the name and address of the plaintiff's solicitor, and taken to the office of the Clerk of Records and Writs, where it is left with the clerk in whose division the cause is filed. Notice should be given on the same day by the solicitor of the plaintiff to the defendant's solicitor, that exceptions are filed: (24th Order of October, 1842.) Exceptions must be filed within six weeks from the date of the filing of the answer, otherwise the answer will be taken to be sufficient, and the plaintiff cannot afterwards except to it: (8th Order, November, 1850.) Exceptions are not now referred to the Master as they used to be, but are disposed of by the court itself in the first instance, under the 13 & 14 Vict. cap. 35, sect. 27.

When the exceptions have been filed, the plaintiff's duty is to set them down for hearing after the expiration of eight days from the filing of the exceptions, and within fourteen days from such filing. If he does not, on the expiration of fourteen days, the answer is to be deemed sufficient (11th and 14th Orders, November, 1850.) But with reference to the eight days, there is an exception that if the plaintiff is required in case of election by notice in writing from the defendant to set them down in four days, under the 13th of the same orders the plaintiff must set them down within such four days. The 11th Order contains another exception as to the eight days, viz., "when the common injunction may be obtained or retained on the allowance of such exceptions." This exception seems now to be entirely neutralised by the 15 & 16 Vict. cap. 86, sect. 58, and the 45th General Order of 7th August, 1852, which abolish the common injunction for default of answer, and assimilate the practice, with respect to injunctions to stay proceedings at law, to the practice with respect to special injunctions generally.

To set the exceptions down, the plaintiff's solicitor obtains from the Secretary of the Lord Chancellor, or of the Master of the Rolls, as in setting down a demurrer or a plea, an order of course, on production of a certificate from the Clerk of Records and Writs Office of the exceptions being filed; and procures that order to be drawn up and passed at the Registrar's office. The Registrar will then set down the exceptions, and the plaintiff's solicitor must, on the same day, serve a notice on the defendant's solicitor (12th Order, November, 1850), otherwise the exceptions will be deemed not to be set down. By the same order, it is directed that exceptions shall be advanced and put into the paper for an early day, of which, in practice, the Registrar gives a note to the plaintiff's solicitor. Whenever the exceptions are set down, the plaintiff's solicitor should, without delay, prepare and deliver his briefs, and he should also leave with the proper officer of the judge before whom the exceptions are to be argued, a copy of the interrogatories, answer and exceptions. The brief on exceptions consists of a brief copy of the bill, of the interrogatories, of the answer, and of the exceptions. No other papers are required, or allowed in taxation, except one or two sheets of observations drawn by the solicitor. On the subject of the observations appended to a brief by the solicitor conducting a case, it may be stated generally, for the guidance of young practitioners, that they are usefully addressed to giving a brief exposition of the general nature of the case; and, in particular, of the peculiar

interests and relative positions of the parties, to assist the counsel in selecting the points to which it is most important for the substantial interests of his clients, that he should address his arguments. But it is not in general desirable in such observations to suggest arguments, or to refer to authorities, as it is the peculiar duty and province of the counsel to find those, and they are sometimes rather embarrassed than assisted, by having to consider a great variety of arguments and cases.

When the exceptions come on for argument, the leading counsel for the exceptant opens successively each exception, by generally stating, first so much of the nature of the case as is requisite to show what is material to be answered; then, reading the interrogatory to which an alleged insufficient answer has been put in, and the answer to it; and then commenting upon the answer to show that the interrogatory is not satisfactorily answered. He is followed by his junior, who offers such further observations as experience may dictate to him. The counsel for the defendant then, in the same order, oppose the arguments of the plaintiff, and the plaintiff's leading counsel replies. The court, in general, gives judgment separately on each exception. If all the exceptions are allowed or disallowed, they are usually allowed or disallowed with costs to be paid by the unsuccessful party; but the costs are in the discretion of the court. If some exceptions are successful and others fail, the costs are usually made costs in the cause; that is, they follow the general result of the final decision; or sometimes the court will direct that there shall be no costs on either side. As to those parts of the answer to which exceptions are allowed, the court may, and usually does at once, appoint the time within which the defendant must put in a further and better answer. The defendant must then, within that time, file such further and more complete answer. If he does not, the plaintiff may sue out process of contempt against him to compel him: (17th Order, November, 1850.) And the plaintiff's course is then the same as that already pointed out in reference to compelling an answer in the first instance. When the defendant has put in a further answer, if the plaintiff is advised that it is still insufficient, he may, within fourteen days from the filing of such further answer, again set down the old exceptions; if he does not, the answer is to be deemed sufficient (16th Order, November, 1850), and so with respect to a third answer. But on setting down the old exceptions after a defendant's second or third answer, the plaintiff must, in

the notice to the defendant's solicitor of setting down the exceptions, state the particular exception or exceptions to which he requires a further answer: (19th Order, November, 1850.)

If a third answer is held insufficient on argument, the court may order the defendant to be examined on interrogatories, ⁽¹⁾ and to stand committed until he shall have perfectly answered, and the defendant is to pay such costs as the court shall think fit to award: (22nd Order, November, 1850.) I am not apprised of any instance in which these orders have been acted upon since the 15 & 16 Vict. cap. 86, and indeed it must be a very peculiar case in which it could be desirable to incur the delay and expense of two or three successive sets of exceptions, each requiring to be filed, set down and argued, when, as already observed, the plaintiff may obtain at once production on affidavit from the defendant of all the *documentary evidence* which he professes; and may as to other things insufficiently answered, by putting the cause at issue, proceed to examine the defendant *vivâ voce* on all other matters in issue, in much less time than would be required to file, set down and hear the exceptions.

The defendant, instead of meeting the original exceptions to his answers on argument, may within the eight days from the filing of the exceptions submit to them: (provided he is not in contempt.) And if he does so, and pays 20s. costs to the plaintiff, he has three weeks from the date of the submission within which he may file his answer (10th Order, November, 1850); so he may after the exceptions have been set down, and before they are heard, submit (17th Order, November, 1850); if, however, he waits till they are set down, it is presumed he must apply to the judge's chief clerk in chambers by summons upon notice to the plaintiff, for an order for further time. For the 17th Order of November, 1850, appears to contemplate this case, and to intend a specific application to the court; but since, under the 26th sect. of the 15 & 16 Vict. cap. 80, and the practice adopted under it, all orders for time to answer are to be made in chambers, it is presumed that now, in such a case, the application would be, as above pointed out, to the judge's chief clerk, and as the order

(1) Interrogatories, as a mode of examining in general, are abolished by the 15 & 16 Vict. cap. 86, sect. 28. But in proceedings in chambers under the 15 & 16 Vict. cap. 80, sect. 30, plaintiffs and witnesses may still be examined on affidavits, or interrogatories, or *vivâ voce*, as the judge shall direct.

would be discretionary under the 17th Order of November, 1850, and therefore the application susceptible of opposition, it should be made on notice of the summons.

The plaintiff was frequently advised, under the old practice, and it may still as frequently be material for him, to amend his bill after the exceptions to the answer have been either allowed or submitted to; and to require the amendments and exceptions to be answered at the same time. If he did so under the old practice, the order to amend was of course; and the defendant had the same time to answer the amendments and exceptions as he would have had to answer an amended bill *simpliciter*, although that time might exceed the time given by the Master for putting in a further answer. It would seem that the practice cannot now be strictly followed, the order for time to put in a further answer under the 17th Order of 1850 being an order of the court, and the defendant being expressly liable to process of contempt if he disobeys it: (17th Order, November, 1850.) It follows, that unless the time given to him is the same as that to which he would be entitled under an order of course to amend (which would not be any time certain from the amendment of the bill, but fourteen days after the service upon him of the interrogatories), he must answer the exceptions and amendments separately; so that an order of course to answer the exceptions and amendments together will be, under the new practice, in fact an impracticable order, unless it includes terms that the time for answering the exceptions is to be co-equal with the time at which regularly the amendments must be answered. It is apprehended, therefore, that the application for an order for time to amend, and that the defendant may answer the amendments and exceptions together, must be on notice, so that the judge's chief clerk may introduce into the order the necessary terms.

The old rule is not abolished, that if the defence joins an answer and demurrer, or an answer and plea, the plaintiff must not except to the answer until the demurrer or plea has been disposed of; for if he does he thereby admits the validity of the demurrer or plea. So there is nothing in the new statutes or orders which alters the rule, that if a plaintiff amends his bill after exceptions to the original answers allowed or submitted to, and afterwards sets down again the old exceptions, and has required an answer to interrogatories filed with the amended bill, he may file and proceed with new exceptions to any part of the answer to the amended bill; and he may set them down and take the

opinion of the court upon the new exceptions, independently of the hearing of the old exceptions, though probably for convenience' sake the court would, unless good reason for a contrary proceeding be shown, direct the two sets of exceptions to be brought on together. It is scarcely necessary to remark that, as under the old system of pleading and practice, the new exceptions must not touch matters covered by the old exceptions.

It has been observed, that exceptions for insufficiency are very infrequent under the modern practice. The most usual, and, in most cases, the most material defect of an answer is an insufficient discovery of what documents, papers, and accounts are in the defendant's possession or power. When the answer is defective on this point, the most usual modern course is for the plaintiff, instead of excepting to the answer, to take out a summons at the judge's chambers, that the defendant may bring in an affidavit stating what books and papers he has. The form of this affidavit has been settled at the Rolls, and approved by the other judges (see *infra*, p. 31.)

VII. *Of production and deposit of documents under the statute 15 & 16 Vict. c. 86.*

As this proceeding is of incessant occurrence in chancery suits, and always early in the suit, it will be convenient to dispose of it here, although it would properly belong to the subject of interlocutory applications.

The order, whether for deposit of documents, or only for inspection, is made under the 18th section of the 15 & 16 Vict. cap. 86, which directs, "that it shall be lawful for the court, upon the application of the plaintiff in any suit in the said court, whether commenced by bill or by claim; and as to a suit commenced by bill whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production, by any defendant upon oath, of such of the documents in his possession or power relating to matters in question in the suit as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just." The 20th section reverses the case, and gives the same privilege to a defendant as against the plaintiff. The order must generally, in the first instance, be applied for at chambers, under a notice issuing from the chambers of the Master of the Rolls, dated the 10th November, 1852, acted upon and confirmed in practice by the other judges.

The notice referred to speaks only of the *production* of documents, not of their *deposit*, but the practice is to apply for orders for deposit, at chambers, as well as for orders for production.

The distinction between an order for deposit, and an order for production, is this:—an order for production merely is made for the purpose of obtaining discovery only from the party ordered to produce; an order for deposit is made either for the single purpose of securing documents, or for the double purpose of security and discovery. The results of this distinction are sometimes material; for instance, documents ordered to be produced only for inspection, if brought into court, will in general be ordered out again at a subsequent stage of the cause, if the court is satisfied that sufficient discovery has been obtained, to the party out of whose custody they came, without reference to the question of his interest in them; while documents ordered to be deposited will not be ordered out until the court is satisfied to whom they properly belong: (*Dunn v. Dunn*, 3 Drew. 17.)

The order, according to the form adopted, is that the defendant do file an affidavit and produce for inspection or deposit them, as the case may be. It must be obtained on a summons on notice to the defendant, as it may, of course, as to *inspection* or *deposit*, be opposed on many grounds. If there is any serious and difficult question involved in the opposition, the application is usually adjourned to be argued in open court; sometimes after argument before and an order made by the chief clerk; sometimes by the application being originally brought before the judge in chambers, and by him adjourned to the court.

The form of the order to make an affidavit, and for inspection of documents under this statute is as follows:—

The Master of the Rolls (or Vice Chancellor) at chambers.

Upon the application of _____, and hearing the solicitor for the _____.

It is ordered that the _____ do within _____ make and file a full and sufficient affidavit stating whether he has, or has had in his possession or power any, and, if any, what documents relating to the matters in question in this suit, and accounting for the same.

And it is ordered that the said _____ do, at all seasonable times, upon reasonable notice, produce at the office of _____, at _____, such of the said documents as by such affidavit shall appear to be in his

possession or power, except such of the same, if any, as he may by his said affidavit object to produce.

And it is ordered that the said _____, his solicitor or agent, be at liberty to inspect and peruse the documents so produced, and to take copies thereof, and abstracts and extracts therefrom, as the _____ shall be advised, at his expense.

And it is ordered that the said _____ do produce the same before any examiner of this court, and at the hearing of the cause, as the said _____ shall require.

And the said _____ is to be at liberty to make such further application as to all or any of the documents mentioned in the said affidavit, as he may be advised.

The order for an affidavit and *deposit* is in the same form, except that it orders the documents to be "produced, and left with the Clerk of Records and Writs, in whose division the cause is," instead of ordinary production only; and it orders that the *Clerk of Records and Writs* do produce the same before any examiner, and at the hearing of the cause, instead of ordering the party to do so.

The affidavit to be brought in, with documents, by the party ordered to produce them, is as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit, set forth in the first and second parts of the first schedule hereto annexed.

2. I further say, that I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. I further say (*state upon what grounds the objection is made, and verify the facts so far as may be.*)

4. I further say, that I have had, but have not now in my possession or power, the documents relating to the matters in question in the suit set forth in the second schedule hereto annexed.

5. I further say, that the last-mentioned documents were last in my possession or power on (*state when.*)

6. I further say (*state what has become of the last-mentioned documents, and in whose possession they now are.*)

7. I further say, according to the best of my knowledge, remembrance, information and belief, that I have not now, and never had, in my own possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody, or power of any other persons or person on my behalf, any deed, account,

book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of an extract from any such documents, or any other document whatever relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the first and second schedule, hereto."

These forms have received the sanction of the court : (*Rochdale Canal Company v. King*, 15 Beav. 11.)

The application for an order for production or deposit upon affidavit is under the 15 & 16 Vict. cap. 86; and does not exclude an ordinary application for production, according to the old practice, upon the admissions in the answer, if a sufficient answer on that point has been put in. This subject will be treated of in its place under the head of interlocutory applications.

VIII. *Of exceptions for scandal.*

An answer is open to other objections besides that of insufficiency. It may be what is called scandalous; or it may be impertinent. An answer is scandalous when it contains matter which is not only wholly irrelevant to any of the matters in issue, but also reflects upon the character of the plaintiff, or of some other person, or uses language unfit for the court to hear. It is impertinent, when it contains matters simply irrelevant, though it may be in no sense offensive to any person, or when it indulges in wholly indefensible prolixity. Impertinence was formerly a subject for exception; but by the 17th section of the 15 & 16 Vict. cap. 86, exceptions to impertinence in pleadings are abolished, and the impertinent matter is to be dealt with upon application to the court in disposing of the costs. The 30th General Order of 7th August, 1852, provides that the application to be made for the costs of any impertinent matter introduced into any bill, answer or other proceeding, is to be made at the time when the court disposes of the costs of the cause or matter, and not at any other time. Under this order the question of the costs of impertinence in an answer will not be disposed of till the hearing of the cause. The consideration of that subject will therefore be postponed to a subsequent chapter.

Exceptions still lie for scandal, and are disposed of by the court at once, like exceptions for insufficiency (13 & 14 Vict. cap. 35, sect. 27), and the course of practice in proceeding to obtain the excision of scandalous matters from

an answer does not differ materially from the course taken to obtain a further answer. The objectionable matter must be brought before the court by exceptions, which must be signed and are usually drawn by counsel, and the exceptions must describe the particular passages which are alleged to be scandalous: (23rd Order, 2nd November, 1850.)

The plaintiff having filed exceptions for scandal must set them down within six days after the filing thereof, otherwise they are to be considered as abandoned, and the plaintiff will have to pay to the defendant such costs as he may have incurred by the filing of the exceptions. When set down, the mode of proceeding to do which is the same as in setting down exceptions for insufficiency, they will be ordered and put in the paper for hearing on an early day, and the plaintiff must, on the day on which they are set down, serve a notice thereof on the defendant or his solicitor, otherwise the exceptions will be deemed not set down: (12th Order, 2nd November, 1850.) The exceptions are argued in the same manner as exceptions for insufficiency, separately, and the court gives judgment on each exception. If the court determines in favour of any of the exceptions declaring any passages objected to scandalous, an order is made accordingly, which must be drawn up, passed and entered like any other order; and on production of the order, the officers having the charge or custody of the answer will expunge from it the parts which the court has held scandalous. The costs on disposing of exceptions for scandal are in the discretion of the court.

IX. *Of filing replication and going into evidence.*

When a complete answer and discovery, so far as the defendant can give it, have been obtained, the plaintiff's next step in a suit proceeding in the ordinary way to a regular hearing, is to put the cause at issue by filing replication, which in such a case is to be done as under the old practice. The effect of replication is to deny generally the truth of the defendant's answer, and to put him to prove the allegations in it. Replication must be filed, where answers have been required and put in, within four weeks after the last answer is deemed or found to be sufficient: (16th Order, 8th May, 1848, No. 37.) When there are several defendants, the last answer means the last sufficient answer of the last answering defendant. The replication is prepared by the plaintiff's solicitor on parchment (the form of it is set out in the 93rd Order of 8th May, 1845), and is taken to the Writ and

Record Clerk to be filed. On the same day the plaintiff's solicitor must give notice to the defendant's solicitor of his having filed replication. In *Johnson v. Tucker*, 15 Sim. 599, a replication was ordered to be taken off the file because such notice had not been given; but in a later case, apparently fully argued, and in which *Johnson v. Tucker* was cited, the court refused to take the replication off the file, and instead, extended the time for the defendant to take the next step in the cause, so as to give him the same time from the notice that he would have had from the day of filing replication: (*Wright v. Angle*, 11 Jur. 987.) By the filing of replication the cause is completely put in issue, and each party may thereupon prepare for the examination of his witnesses.

Before proceeding to discuss the mode of taking evidence, it will be convenient here to explain some of the details affecting the filing of replication. There can be but one replication in a cause, unless the court otherwise orders: (93rd Order, May, 1845.) It is clear, however, that within the meaning of that order the court may order more than one replication (*Rogers v. Hooper*, 2 Drew. see p. 97); but that course is frequently inconvenient, in many cases in which it is found, by computing the times allowed in procedure, that the times within which the evidence must be closed would be different with reference to the separate replications; but when that ground of inconvenience does not apply, the court will, if satisfactory reasons are shown, order more than one replication: (*Rogers v. Hooper*, 2 Drew. 97.) If the ground of inconvenience applies, the proper course for the plaintiff, is to apply for leave to withdraw replication, and to file a fresh replication. Either of these applications is by motion on notice to the court, and not in chambers. If, however, an application to withdraw replication is not made till the cause is at such a stage that the defendant will be put unnecessarily and improperly to costs by the effect of withdrawing replication, the court will only give the leave on payment by the plaintiff of such costs as it thinks will meet the justice of the case: (*Champney v. Buchan*, 3 Drew. 5.) Nor is it of course to permit more than one replication to be filed: a case of necessity must be shown: (*Stinton v. Taylor*, 4 Hare, 608.)

Replication should, of course, be filed against all the answering defendants, whom it is desired to put to proof of the matters alleged in their answers; for as against any defendants against whom the answers are not replied to, the cause will be heard on bill and answer, that is, the plaintiff

will be taken to admit the answer to be true, and the answer is and may be received as evidence at the hearing for the defendant. The replication which indicates against what defendants the cause will be heard on bill and answer, will be framed accordingly.

The consequence of not filing replication at the proper time is that the defendant may move to dismiss the bill for want of prosecution (16th Order of May, 1845, sect. 37); but when such a motion is made, the court, instead of dismissing the bill, almost invariably, except in a case of very gross delay, gives the plaintiff leave to file replication within such time as in the view of the court is sufficient, having regard to the nature of the explanation given by the plaintiff of the delay. Under the new practice, when a defendant has neither answered nor been required to answer, he is considered as having traversed the case made by the bill, and it follows that the plaintiff must prove his whole case, and issue is to be joined by filing replication: (28th Order of 7th August, 1852.) No specific time is fixed by the act of the 15 & 16 Vict. cap. 86, nor by the orders under it for filing replication, where the defendant has not been required to answer, and has not answered. But it will be prudent always to file replication at the earliest possible time after the plaintiff is in a position to be entitled to do so, as by the 29th Order of August, 1852, the defendant to a suit commenced by bill, who shall not have been required to answer, and shall not have answered, may move to dismiss the bill at the expiration of three months after his appearance, unless in the meantime the plaintiff shall have moved for a decree (under the 15th section of the 15 & 16 Vict. cap. 86, and the orders made in respect of that mode of proceeding), or shall have set the cause down to be heard.

X. Of the plaintiff's proceedings on going into evidence.

It must be borne in mind generally, that now the parties to a suit may be witnesses for or against themselves, and a wife may give evidence against her husband, and the husband against the wife: (14 & 15 Vict. cap. 99, and 16 & 17 Vict. cap. 83.) Evidence for the hearing of a cause regularly brought to a hearing, may now be taken in two ways: either by affidavits, or by oral evidence; the old practice of examining on interrogatories being entirely abolished by the 15 & 16 Vict. cap. 86, sect. 28, subject only to a power in the court to order particular witnesses to be examined on interrogatories. The plaintiff may in the first

instance, elect whether he will proceed to take evidence by affidavit or orally (29th sect. of 15 & 16 Vict. cap. 86), and he must give notice to the defendant of what his intention is, seven days after issue joined (31st Order of 7th August, 1852); if he does not give any notice, or if he gives notice that he intends to proceed by affidavit, the plaintiff and defendant are both at liberty to verify their respective cases by affidavit; but if any defendant shall, within fourteen days after the expiration of the seven days, give notice to the plaintiff or his solicitor that he desires the evidence to be oral, then the evidence must be taken orally: (30th sect. of the 15 & 16 Vict. cap. 86, and 31st Order of August, 1852.) It follows, therefore, that it may be a fruitless expenditure of time and trouble for the plaintiff to prepare affidavits until the expiration of the fourteen days from the date of his notice; but that delay is not in practice material, because in most cases of the least importance, it is not more than is required for obtaining advice on evidence, and preparing instructions for counsel to settle affidavits, or to examine *vivâ voce*, as the case may be. For when the plaintiff's solicitor has filed replication, before collecting evidence, he usually lays the bill and answers, and copies of the documents intended to be relied on, before his counsel to advise, on evidence—that is, to advise on what points the defendant's answer may be relied upon as evidence for the plaintiff, on what points it is material that the plaintiff should produce evidence, and in which of the modes permitted by the practice evidence should be adduced.⁽¹⁾ When the solicitor has procured his counsel's opinion on these matters, his next step, whether the plaintiff intends to proceed by affidavit or by oral evidence, should be to collect and examine his witnesses, and to take down in writing what depositions relating to the matters in issue, on which he is advised to go into evidence, each of them can make. This part of the solicitor's duties is among the most important and difficult of his functions; in executing it he must ex-

(1) Since the printing of this passage the following (the 4th) General Order, dated January, 13, 1855, has been issued. "It shall not be competent for the plaintiff or any defendant to require by notice or otherwise, that the evidence to be adduced in a cause shall be taken orally, but when issue shall have been joined in any cause, the plaintiff and defendants respectively shall be at liberty to verify their respective cases either wholly or partially by affidavit, or wholly or partially by the oral examination of witnesses before one of the examiners of the court, or before an examiner to be specially appointed by the court."

ercise much judgment in the selection of his witnesses, so as not to bring forward a witness who may, either from ignorance, or impetuosity, or from improper motives, damage his case; and so as not to mislead his counsel, particularly when the evidence is intended to be *vivá voce*, by suggesting, as fit to be relied upon, as testimony, depositions which cannot be borne out by the witness when he is under actual examination. In doing this duty the solicitor will remember also that he has only himself to rely upon: since partly by reason of a rule of etiquette, the ground of which is not very intelligible, and partly from a rule of convenience which is perfectly intelligible, counsel never in practice see or communicate with the witnesses before their examination. The preliminary depositions thus taken by the solicitor should be carefully and clearly set out as part, and the most material part, of the instructions given to the counsel who is to prepare the affidavits or to examine the witnesses.

If the evidence is intended to be taken by affidavit, the depositions should be laid before counsel, with copies of the bill and answer, and of the documents in the case, as his instructions to prepare or to settle the affidavits (that is, when the plaintiff's solicitor chooses to have the affidavits settled by counsel, a practice which is in general advisable, though it is by no means universal.) Affidavits are to be divided into paragraphs, and every paragraph is to be numbered consecutively, and as nearly as may be confined to a distinct portion of the subject: (15 & 16 Vict. cap. 86, sect. 37.) And they must be in the first person (126th Order, May, 1845.)⁽¹⁾ When the affidavits are drawn and settled, they are copied on paper (and care should be taken that there are no erasures); and they are sworn before the Clerk of Affidavits, who files them and delivers out office copies, which must be obtained to be used at the hearing, and in any proceeding in which the evidence is to be relied on.

Affidavits sworn in London may also be sworn before one of the "London Commissioners to administer oaths in Chancery," appointed under the 16 & 17 Vict. cap. 78. These commissioners must be solicitors, practising and having an office within ten miles from Lincoln's Inn Hall; but the affidavits sworn before them need not be sworn at their offices, but any where within the limit mentioned of ten miles from Lincoln's Inn Hall: (*Re Clerks of Records and Writs*, 3 De Gex, M. & G. 723). If an affidavit is to be made by a person residing more than ten miles from Lincoln's

⁽¹⁾ See further Orders relating to affidavits, *post*, p. 40.

Inn Hall, it is sworn before one of "the Commissioners to administer oaths in Chancery," appointed under the 16 & 17 Vict. cap. 78, in substitution of the "Masters Extraordinary in Chancery;" and the name of the place and county where the affidavit is sworn must be expressed in the jurat. If the defendant is in Scotland, Ireland, or in the Channel Islands, or in any colony, island, plantation or place under the dominion of the Queen, an affidavit may be sworn before any judge, court, notary public, or person lawfully authorised to administer oaths in such places; or it may be sworn before any of her Majesty's Consuls or Vice-Consuls in any foreign parts out of her dominions; and the Court of Chancery will take judicial notice of the seal or signature, as the case may be, of such person: (22nd sect. of 15 & 16 Vict. cap. 86.) The act applies to affidavits taken in the colonies before the passing of the act; and affidavits so taken in the presence of a person lawfully authorised to administer oaths, are receivable under the 22nd section of the act, without verification of the signature of the person before whom they are taken: (*Bateman v. Cook*, 3 De Gex, M. & G. 39.) And an affidavit sworn abroad may be filed, although the place at which it is sworn is omitted in the jurat: (*Meek v. Ward*, 10 Hare, App. I.)

The introduction of affidavit and *vivâ voce* evidence has so altered the practice in this material point, that the evidence of each side may be known from time to time, as each part is completed, pending the examination of the witnesses; either party being entitled, if affidavits are used, to obtain from the affidavit office, within forty-eight hours of their being filed, office copies of the affidavits filed by the other: (127th Order of May, 1845.) To prevent the results of this, it is most usual in practice for each party to hold back his affidavits; that is, not to file them till the last day fixed for closing the evidence; and he has a right to do so: (*Thompson v. Partridge*, 17 Jur. 1108.)

It would seem, indeed, from the expressions used in that case by the Lord Justice Turner, that if one party has seen the affidavits of the other side, that fact would be against him in any application to enlarge the time for closing the evidence; and Lord Justice Turner intimates an opinion that it never was the intention that there should be reply upon reply on the affidavits (as in the case of affidavits for and against a motion), or that it should be incumbent on either party to file his affidavits within a limited time.

The plaintiff's solicitor, of course, takes office copies of the affidavits that he files, with which office copies he should

be provided when attending the hearing of the cause, or any previous proceedings in which the evidence is intended to be read.

Before proceeding further it should be generally observed that, strictly speaking, all the ordinary rules of evidence apply to affidavits as well as to *vivâ voce* evidence, though this rule is far from being invariably acted upon.

The most usual defect in affidavits not prepared with due skill and care, arises indeed from a neglect of this rule. Affidavits are, in consequence, frequently presented to the court full of irrelevant matter, and of what may be termed mere gossip, quite useless as evidence, and having no efficacy of any kind except in the swelling of costs, which may ultimately fall on the party on whose behalf they are tendered. It is not intended here to discuss particularly the rules of evidence, but it may be stated generally, for the guidance of the young and inexperienced solicitor, that, with regard to affidavits, they should speak as precisely as possible, and only as to facts touching the matters substantially in issue; they should speak only from the knowledge of the deponent, and not as to mere belief unsupported by proof of facts warranting that belief; and they should avoid altogether hearsay and mere opinion, except where the particular subject-matter is one in which evidence of that kind is properly admissible; as, for instance, in cases of pedigree, where hearsay evidence is good evidence, or in cases of a scientific or professional character, where evidence may strictly (and must, in fact, from the nature of the case) consist of opinion. Also, in preparing affidavits intended to rebut the affidavits filed by the opponent, great care should be taken to rebut the allegations in general, if possible,—not by simple denial, but by the allegation of facts negating the opponent's evidence. It is too common to find that an affidavit answering an affidavit, which alleges facts, consists simply of a string of contradictions of those facts, giving no reasons for the contradictions, and no facts negating the facts intended to be contradicted. Such affidavits in reply are in general worthless—indeed, worse than worthless, because they do not and cannot satisfy the mind of any judge, but may, and most frequently do, give to the court an impression that the deponent has been brought up, as it were, broadly to give the lie to the opposite witness, and thus raise a suspicion of the honesty of the case that he is so brought to support.⁽¹⁾

⁽¹⁾ Since the above passage was in print, it has been ordered by the 8th General Order of the 13th January, 1855, that “all affidavits

By the 38th section of the 15 & 16 Vict. cap. 86, it is provided that "any witness who has made an affidavit filed by any party to a cause shall be subject to oral cross-examination, within such time after the time fixed for closing the evidence as shall be prescribed in that behalf by any order of the Lord Chancellor, by or before an examiner, in the same manner as if the evidence given by him in his affidavits had been given by him orally before the examiner; and after such examination may be re-examined orally by or on the part of the party by whom such affidavits were filed; and such witness shall be bound to attend before the examiner to be so cross-examined and re-examined upon receiving due and proper notice, and payment of his reasonable expenses, in like manner as if he had been duly served with a writ of *subpœna ad testificandum* before such examiner." The time within which the evidence should be closed, including the cross-examination and re-examination of the witnesses, is eight weeks, except that any witness who has made an affidavit intended to be used by any party to a cause at the hearing thereof, is subject to cross-examination within one month after the expiration of the said eight weeks: (5th Order of 13th January, 1855.) The plaintiff's solicitor, therefore, when the evidence proceeds by affidavits, should obtain office copies of the defendant's affidavits at the earliest possible period after he has had notice of their being filed, and should lay copies of them, together with the pleadings and the documents, or copies of them, before his counsel; and having procured his advice whether they require cross-examination, he should, if advised to cross-examine, prepare his instructions accordingly. He must give forty-eight hours' notice to the defendant's solicitor of the time and place of the cross-examination: (34th Order, 7th August, 1852.) The service of a *subpœna ad testificandum* is, as it will have been noticed, dispensed with by the statute; both the statute and the orders are, however, silent as to what notice must be given to the witness,—nor was the pre-

whether to be used at the hearing of a cause, or on any other proceeding before the court, are to state distinctly what facts or circumstances deposed to are within the deponent's own knowledge, and his means of knowledge, and what facts or circumstances deposed to are known to or believed by him by reason of information derived from other sources than his own knowledge, and what such sources are." And by the 9th Order, "the costs of affidavits not in conformity with the preceding order, are to be disallowed on taxation, unless the court shall otherwise direct."

cise time for moving for the writ before the time appointed for the examination fixed under the old practice. I believe the practice is to give him, if in London or within ten miles of it, forty-eight hours' notice. Regularly, the cross-examination takes place before one of the official or ordinary examiners of the court, at whose office the plaintiff's solicitor desiring to cross-examine will obtain an appointment; and he must leave at the examiner's office a copy of the bill, and of the answer, if any: (31st section of 15 & 16 Vict. cap. 86.) The plaintiff's brief for cross-examining will consist of copies of the bill and answer, and the affidavits filed; and of such further information as the plaintiff's solicitor may have been able to obtain, if any, as to the knowledge of the witness about the facts to which he has deposed, and on which he is to be cross-examined.

The cross-examination of the witnesses is, of course, opened by the cross-examining party; the affidavits of each party being the examination of his witnesses in chief. The cross-examination is conducted as nearly as possible on the same principle, and in the same manner, as a cross-examination at *Nisi Prius*. The language of the statute is, that oral examination before the examiner is "to be conducted as nearly as may be in the mode now in use in Courts of Common Law with respect to a witness about to go abroad, and not expected to be present at the trial:" (sect. 31.) Unfortunately, it seems that on what is the peculiar mode of examining at common law with respect to a witness about to go abroad, if, indeed, it differs at all from the mode followed in open court at *Nisi Prius*, no authority can be found (see *Lord v. Colvin*, 2 Drew. 208); but the practice at *Nisi Prius* is well known, and is usually followed in practice in the examiner's office. The *depositions* of the witnesses are taken down by the examiner in writing, and must be with his own hand, in the form of a narrative. The questions and answers are not usually taken down; but the examiner may put down any question or answer if he thinks fit. The examiner has no power to decide upon the materiality or relevancy of any question; but if any question is objected to he gives his opinion thereon, and notices both the question objected to and his opinion on the face of the depositions. He is not, however precluded by the act or orders from applying the ordinary rules of evidence as to admissibility, and in practice does accordingly apply them.

When the plaintiff's counsel has cross-examined any of the defendant's affidavit witnesses, the defendant's counsel re-examines them, following, in such re-examination, the

practice adopted in re-examination at Nisi Prins; and so, if the defendant cross-examines any of the plaintiff's witnesses, the plaintiff is entitled to re-examine them; the original affidavits being, as already observed, treated as an examination-in-chief on each side. The re-examination of any witness must, however, immediately follow his cross-examination, and not be delayed to a future period: (35th Order of 7th August, 1852.) If a witness produced at the examiner's office for examination or cross-examination refuses to be sworn or to answer, he is to be dealt with as he would have been under the old practice if he refused to be sworn or to answer the written interrogatories (33rd section of 15 & 16 Vict. cap. 86); that is, the examiner certifies that he has so refused, and the party examining moves in court *ex parte*, on production of the examiner's certificate, that the witness may be ordered to answer within four days or stand committed: (*Austin v. Prince*, 1 Sim. 348.) But if a witness demurs or objects to any question put to him, the question and the demurrer or objection are to be taken down by the examiner, and transmitted by him to the Record Office, and the validity of the demurrer or objection is to be decided by the court: (15 & 16 Vict. cap. 86, sect. 33.) The solicitor of the examining party then takes an office copy of the demurrer or objection at the Record Office, and obtains an order in the usual way to set it down; but he serves the order on the witness only, and the demurrer will be set down to be argued after any demurrer or plea already set down. When the depositions are completed, the original depositions signed by the examiner are transmitted by him to the Record Office, and are there filed; and the plaintiff's solicitor then takes an office copy of them, on payment of 4*d.* per folio. A brief copy of the depositions will form part of the brief to be used at the hearing of the cause. If, as is most usually the case, the evidence cannot be completed by either party within the time fixed by the General Order, the time may be extended by an order of the court (38th section 15 & 16 Vict. cap. 86); for which an application in chambers must be made: (Notice of Master of the Rolls, 10th November, 1852.) If both parties desire time, and agree to have the time extended, the order is obtained as a consent order; but if either party objects, the party desiring the extension must support the application by affidavits showing that there has been no avoidable delay, and that justice cannot be done without giving him further time. After the time fixed for closing the evidence, no evidence can be received without the special leave of the court first obtained: (38th

section of 15 & 16 Vict. cap. 86.) The application for such special leave is made in open court, and not in chambers.

If, instead of proceeding by affidavit evidence, the plaintiff elects, and gives such notice as pointed out above, or if any defendant requires that the evidence should be oral, an appointment will be obtained by the plaintiff's solicitor, whenever he is ready to examine any of his witnesses, at the examiner's office.⁽¹⁾ [It has been already noticed, that he may examine any defendant as a witness, and he does not thereby lose or vitiate his right to a decree against him: (*Harford v. Rees*, 9 Hare, App. 70)]; and he should give to the solicitor of the defendant forty-eight hours' notice of the appointment: (36th Order, 7th August, 1852.) The same course of examination then takes place before the examiner as already pointed out for cross-examination of affidavit witnesses, except that, of course, each party first examines his witnesses in chief *vivâ voce*, instead of by affidavit; and the same general rules govern the examination as in an examination at Nisi Prius. The depositions, when completed, will be dealt with as above pointed out.

Although the parties may have elected to proceed by oral evidence, affidavits by particular witnesses, or as to particular facts and circumstances, might, before the Orders of January, 1855, be taken to be used at the hearing as by consent, or by leave of the court obtained upon notice, and such consent might be given by or on the part of married women, or infants, or other persons under disability, with the sanction of the court: (15 & 16 Vict. cap. 86, sect. 36.) To obtain such an order there must be special reasons applicable to particular witnesses—reasons arising out of the particular facts of the case; the mere fact of witnesses being elderly persons is not enough: (*Rogers v. Hooper*, 2 Drew. 97.)⁽²⁾

It occurs frequently that the examiner's office is too full of business to allow of an appointment sufficiently early to meet the pressing nature of the suit; and it occurs also, of course, occasionally, that witnesses require to be examined who, either from age or illness, or distance of residence, cannot be brought to the examiner's office. In

(1) It will be recollected that by the 4th General Order of January, 1855, such notice, or requisition, is not now necessary: (see *ante*, p. 37.)

(2) The 4th Order of January, 1855, seems to render the above section of the statute now wholly inapplicable.

any of these cases it becomes necessary to obtain the appointment of a special examiner (under the 31st section of the 15 & 16 Vict. cap. 86), who, if the examination is to be conducted in town, is usually, but not necessarily, a barrister; and, if in the country, either a barrister or a solicitor practising in the neighbourhood where the witnesses reside; but a layman may, it seems, under circumstances, be a special examiner. When the appointment of a special examiner becomes requisite by the state of business in the examiner's office, if the parties can agree in the selection of an examiner, either party, but usually the plaintiff, applies to the court, the other party appearing and consenting to the appointment of the person selected, who is then appointed by an order of the court, and forthwith becomes and is the examiner for the purposes stated in the order, and is invested, by force of the 15 & 16 Vict. cap. 86, with all the authority and power of one of the regular examiners of the court. The business of examining witnesses is conducted before a special examiner at such times and places as he appoints, with the same formalities, and according to the same practice, as if he were one of such regular examiners, and when the depositions are concluded before him, as he has no officer responsible for the transmission of the depositions, it would seem he must personally deposit them in the Record Office. The practice, at any rate, is for him to do so. If the parties to a suit cannot agree in the choice of a special examiner, or if either party objects altogether to a special examiner, the party desiring it must apply to the court, by motion on notice, for an order appointing a special examiner. Such a motion must be supported by affidavits verifying the merits—that is, the circumstances on which the application is founded; and generally the court will make the order, if satisfactory proof is produced that the nature of the cause requires expedition beyond that which could be obtained in the ordinary course of business, and that an appointment cannot be obtained in time, such as that the witnesses, or some of them, are very old or in such infirm health as to warrant expectation of death before an appointment could be obtained, or are about to proceed abroad; or that other circumstances of a like nature exist, from which the court will collect that justice will probably be defeated if the party applying waits for his turn in the examiner's office, in the usual course of business: (see *Brennan v. Preston*, 10 Hare, App. 17; *Pillar v. Thompson*, 10 Hare, App. 76.) The motion is properly to the court, and not in chambers (*MacNiece v.*

Acton, 22 L. J. 584); but such orders may be and are made on application to the chief clerk in chambers: (*Williams v. Williams*, 22 L. J. 639.) The distinction, when they should be made by motion in court, and when upon summons before the chief clerk, seems to be this: that they are properly made in chambers when they are consented to, or when the grounds of application and objection are not such as to require much argument; but that when they involve difficult questions of fact, or of law, or of both, directly or indirectly, they should be made to the court at once, and for this reason—that if made before the chief clerk, and either party is dissatisfied with his decision, and desires to take the opinion of the judge upon it, the judge would in such a case, almost of course, adjourn the case to be argued by counsel in court. It will, therefore, be matter for the discretion of the solicitor, depending on the nature and facts of the case, when to apply in chambers, and when to instruct counsel to move in court; and it will be borne in mind that if either course is improperly taken, the extra costs occasioned may fall on the party taking it.

The consideration of the details of the method in which these and other motions must be prepared and conducted will belong to a subsequent chapter, devoted to the subject of interlocutory applications by motion generally, which forms a considerable portion of the business of the court. Generally, however, it may be here at once observed, that all motions, the order to be made on which depends on the discretion of the court—that is, all motions which are from their nature susceptible of opposition—must be made on notice, and that, regularly, notice of motion must be served on the solicitor of the opponent two clear days before the first day on which the motion can be made; that is, a notice of motion for Thursday must be served on Monday, and so on; but a notice of motion on Tuesday is properly served on Saturday, although one of the two clear days is a blank day. So, if an application, in the nature of a motion capable of opposition, is made upon summons in chambers, the summons must be served two clear days before the return: (5th Order of 16th October, 1852.)

The evidence in a cause, whether taken by affidavit or orally, ought regularly to be concluded within eight weeks from the time when the cause has been put at issue, by filing replication, with the addition of one month from the end of the eight weeks for cross-examining affidavit witnesses. The time for setting down the cause when the evidence is by

affidavit, and either party cross-examines orally, does not, however, begin to run from the end of the eight weeks, but from the end of the time allowed for cross-examining : (*Simkins v. Vaughan*, V. C. K., 13th January, 1855, not yet reported); and when it is so completed, and the depositions have been duly lodged by the examiner in the Record Office, either party may take office copies therefrom of the whole or any part of the depositions : (34th sect. of 15 & 16 Vict. cap. 86.)

In practice, the evidence in contested cases rarely is completed within the regular time by either party, and then, if both parties being in the same predicament agree, the time is enlarged by consent by an order of course, obtained from the chief clerk on a summons in chambers, on the application of the solicitor of one of the parties, the solicitor of the other appearing and consenting. But if either party is ready and desirous to proceed with the cause, and the other is not, the party not ready applies in chambers, upon a summons on notice to the solicitor on the other side to extend the time for taking the evidence. This application will not be granted as of course, but must be supported by affidavits showing that there has been neither wilful delay nor culpable neglect, and explaining the delay in such a way as to satisfy the chief clerk that, using reasonable diligence, the applicant could not complete his evidence within the regular time. The applicant for time, as he is asking an indulgence, will, in almost all cases, have to pay the costs of the application, even when it is granted; of course, he must pay the costs if it is refused.

Although in general, as pointed out, all evidence for the hearing of the cause must be either on affidavit or oral, the court may, if it thinks fit, order any particular witness or witnesses, within the jurisdiction or out of the jurisdiction, to be examined upon interrogatories in the old mode; and with respect to such witnesses, the old practice of the court in relation to the examination of witnesses continues in full force, except so far as the same may be varied by any general order of the Lord Chancellor, or by any order of the court with reference to any particular case : (28th section of the 15 & 16 Vict. cap. 86.) There is no general order varying the old practice on this subject, and it therefore becomes necessary to point out briefly what it is. When a witness is to be examined on interrogatories, draft interrogatories must be prepared; they are invariably drawn, and must be signed, by counsel. The general advice given in a previous page for the guidance of the inexperienced solicitor

in preparing instructions for settling affidavits, will apply equally to the preparation of instructions for interrogatories. When settled, they are transcribed upon unstamped parchment and left at the examiner's office to be filed, and an appointment is then made for the examination of the witness; at the time appointed, the solicitor attends with his witness or witnesses; they are sworn and examined by the examiner privately, no person being allowed to be present. The solicitor of the examining party should, however, be in attendance. The statute, in the 28th section referred to, does not speak of *cross-examination*, and I am not aware of any reported case in which that section has yet been acted upon; however, I conclude that the act, by the word *examination*, must mean full examination—that is, examination, cross-examination, and re-examination. When the examination of a witness in chief upon interrogatories has been concluded, the solicitor of the party examining him gives notice to the other side that he has done so, in order to give him an opportunity of cross-examining. The notice contains the name and description of the witness and the place of his abode in London; and he must keep the witness at his own expense in town for forty-eight hours after the service of such written notice, and so, if the witness is cross-examined, he must be kept by the party producing him in town at his own expense, until the cross-examination is completed; but the party intending to cross-examine must leave his interrogatories at the examiner's office within the forty-eight hours, otherwise he will have to keep the witness in town for cross-examination at his expense.

It follows from the reservation of the old practice as to examining particular witnesses on interrogatories, that the old rules as to publication passing and its consequences exist, and must have some effect where no special order is made by the court previously for the particular case, and where such rules are not incompatible with the exigencies of the 15 & 16 Viet. cap. 86, and the orders made under it. But as under the last-mentioned act there is no such thing as passing publication, and as the evidence is, if taken *vivâ voce*, of course known to both sides as it proceeds, the reconciling of the two systems will probably present many difficulties. In the absence of decision, and I am not aware of any since the new practice, to offer speculative suggestions would be worse than useless to the practitioner.

XI. Of proceedings by motion for decree.

A plaintiff may, in certain cases, instead of bringing the cause to a regular hearing, proceed by moving for a decree. This is by the 15th section of the 15 & 16 Vict. c. 86, which provides that, "the plaintiff, in any suit commenced by bill, shall be at liberty, at any time after the time allowed to the defendant for answering the same shall have expired (but before replication), to move the court upon such notice as shall, in that behalf, be prescribed by any general order of the Lord Chancellor for such decree or decretal order as he may think himself entitled to; and the plaintiff and defendant respectively shall be at liberty to file affidavits in support of and in opposition to the motion so to be made, and to use the same on the hearing of such motion; and if such motion shall be made after an answer filed in the cause, the answer shall for the purposes of the motion, be treated as an affidavit." And by the 16th section it is provided, "that upon any such motion for a decree or decretal order it shall be discretionary with the court to grant or refuse the motion, or to make an order giving such directions for or with respect to the further prosecution of the suit, as the circumstances of the case may require, and to make such order as to costs as it may think right."

By the 22nd General Order of the 7th August, 1852, a month's notice is to be given by the plaintiff to the defendant or defendants, of the motion for a decree or decretal order; and by the 23rd of the same orders, the affidavits to be used in support of such motion are to be filed before the service of such notice, and a list of such affidavits is to be set forth at the foot of such notice. The defendants must file their affidavits in answer, and furnish the plaintiff or his solicitor with a list thereof, within fourteen days after the service of the notice of motion: (24th Order of 7th August, 1852.)

And within seven days after the expiration of the fourteen days, the plaintiff must file his affidavits in reply, which must be confined to matters strictly in reply, and he must, within the same time, furnish the defendant or his solicitor with a list thereof. If the affidavits are not strictly in reply, they are not to be regarded by the court, unless, on the hearing of the motion, the court shall give leave to the defendant to answer them, and then the costs of such affidavits and of the further affidavits are to be paid by the plaintiff,

unless the court otherwise orders: (25th Order of 7th August, 1852.) And no further evidence is to be used on either side on the hearing of the motion, without leave of the court: (26th Order of 7th August, 1852.) It must be recollected that a defendant may put in a plea, answer, or demurrer, whether he is required to answer or not: (15 & 16 Vict. c. 86, s. 13.) And by the same section, if the court gives time beyond the regular time for pleading, answering, or demurring, the plaintiff's right to move for a decree is, in the meantime, suspended.

By the 8th Order of 13th January, 1855, "all affidavits, whether to be used at the hearing of a cause or on any other proceeding before the court, are to state distinctly what facts or circumstances deposed to are within the deponent's own knowledge, and his means of knowledge; and what facts or circumstances deposed to are known to or believed by him, by reason of information derived from other sources than his own knowledge, and what such sources are;" and by the 9th of the same Orders, "the costs of affidavits, not in conformity with the 8th Order, are to be disallowed on taxation, unless the court should otherwise direct."

These Orders clearly apply to motions for decree as well as to any other kind of motion; and besides, it seems that a motion for a decree differs in no way from the hearing of a cause: (*Norton v. Steinkopf*, 1 Kay, 50.) In that case it was contended that the relief could not go beyond the notice of motion; but the court held, that relief, according to the prayer of the bill, as at the hearing of a cause in the ordinary way, might be granted. When the plaintiff gives notice of motion for a decree, he should at the same time set the cause down with the registrar; and if he omits to do so until after the expiration of the month, the court will not order the cause to be set down, except upon a motion on notice: (*Boyd v. Jaggard*, 10 Hare, App. 54.) A motion for decree may, in a fit case, be set down for hearing as a short cause; as causes to be heard on motion for decree are to be treated as other causes: (*Ames v. Ames*, 10 Hare, App. 54.) And, by consent, a motion for a decree not heard as a short cause, may be heard before the time fixed by the General Order has expired: (*Loinsworth v. Rowley*, 10 Hare, 55.)

It is not necessary to file replication when the plaintiff proceeds by motion for decree: (*Duffield v. Sturgis*, 9 Hare, App. 77 and 87.) The notice of motion may be served on a defendant out of, as well as on a defendant within the jurisdiction: (*Meek v. Ward*, 10 Hare, App. 55.)

As to the evidence on motion for decree.]—The 23rd Order of the 7th August, 1852, requiring notice to the defendant of the affidavits intended to be read, does not apply to the answer where an answer has been filed before the hearing; that may be used against the defendant, without notice to him; but the answer of one defendant cannot be read against another without notice: (*Cousins v. Vascey*, 9 Hare, App. 61.) This seems at first inconsistent with the settled doctrine, that at the hearing of a cause the answer of one defendant cannot be used at all against another defendant; but it is not so in reality, because the statute, by converting the answers for the purpose of a motion for a decree, into affidavits, makes them, in fact, evidence in the cause, and not mere admissions by particular parties, which is the true and distinctive character of an answer strictly so called. What length of notice should be given, as between co-defendants, is not pointed out in the case referred to. It is obvious that the Orders of the 7th August, 1852, commencing with the 22nd, do not touch the point.

The parties to a suit to be heard on motion for decree, have the same liberty of cross-examining the witnesses who have made affidavits, as they have in respect to any other affidavit evidence, notwithstanding the Orders of the 7th August, 1852, which regulate only the time within which affidavits are to be made (*Williams v. Williams*, 22 L. J. 639), and the order for the appointment of a special examiner (when that is needed), for such cross-examination may, if necessary, be made by the judge's chief clerk in chambers: (*id.*)

It has been held that, under the 30th section of the 15 & 16 Vict. c. 86, the parties are entitled to the writ of the *subpœna ad testificandum*, and *subpœna duces tecum* for the hearing of a cause from the Clerk of Records and Writs, without any preliminary order of the court, as they would be entitled to it under the 40th section for bringing witnesses before an examiner; and that rule applies to hearing a cause on motion for decree, as well as to an ordinary hearing: (*May v. Biggenden*, 17 Jur. 816; *Wigan v. Rowland*, 10 Hare, App. 18.)

XII. *Of interlocutory applications by motion.*

It will be convenient to treat of interlocutory applications by motion in this place, before describing the general procedure in defence, because of the frequency of some of these

applications, before the suit has proceeded even so far as the filing of a sufficient answer.

Interlocutory applications are made by *motion* or by *petition*; I shall here treat only of motions.

It is not easy to state precisely any general rule as to what should be done by motion, and what by petition, beyond this, that in any cases, not governed by the settled practice, a motion is proper when the issue tendered to the court is simple, although it may be incumbered by a great amount of evidence, and that petitions are proper when there are several issues tendered to the court, each requiring its portion of proof. For instance, an application for a receiver or for an injunction, usually tenders but one simple issue; whether there has been a given extent of breach of duty in the party against whom the application is made; and accordingly, though on that question a vast amount of conflicting evidence may be brought forward, it is made by motion. An application for payment of money out of court usually tenders several issues, such as the pedigree of the claimant; the existence and construction of settlements of property, and the like; and accordingly such applications are by petition. There are, on the other hand, classes of applications of which it would be difficult *à priori* to say in which mode they should be made; in most of these a continued course of practice has settled which is the proper mode. But knowledge of the general principle is not without use to the solicitor, as cases occasionally occur which do not fall within the fixed rules of practice.

Motions are of two kinds, motions of course, and special motions. Motions of course are those to which no opposition can be offered, and on which a given order must be made if the party has complied with certain fixed rules. They are made on *ex parte* applications, without notice to the other side. But, like every *ex parte* motion, they must be founded on a true statement of the facts; for if an order of course is obtained on what is termed a false suggestion, it is liable to be set aside. Thus, though it is in general a motion or petition of course to obtain leave to sue *in formâ pauperis*, on an affidavit simply of the filing of the bill and the plaintiff being a pauper, yet where an order was so obtained, and the circumstances which were not stated were, that the plaintiff claimed partly under the heirs of a French subject, and through an instrument of doubtful construction, the order was held irregular and discharged, even on the assumption that the facts as appearing on the motion to discharge it, would justify the order. The application must

state all that is material, otherwise the order is irregular, and will be discharged on the single ground of irregularity: (*St. Victor v. Devereux*, 6 Beav. 584; see also *Nowell v. Whitaker*, 6 Beav. 407. Motions of course may be made on any day in or out of term: (*Lord Harborough v. Wartnaby*, 1 Phil. 364.) In a case of *Radburn v. Lewis*, 7 Beav. 353, some doubt appears to be suggested whether the rule is universal. I believe, however, it has been since always acted upon as universal.

All *motions*, strictly so called, are made by counsel, though some require only the signature of counsel and do not require to be mentioned to the court, but are handed in to the Registrar of the day, who enters a note of them in his book, and marks the brief with his initials. Thereupon the order made can be drawn up, as if it were made upon an order pronounced by the court on hearing the motion. An order of course should be served as soon as possible on the party against whom it is made, for whether an order of course is or is not positively no order because it has not been served, it is clear that until served it is no effective order, and that if before it is served the other party takes a regular step, the order of course cannot afterwards be acted upon against that step: (*Church v. Marsh*, 2 Hare, 652.) Motions of course requiring the intervention of counsel are now, however, very rare, firstly, because most of the orders which formerly required, and might now still be obtained on motions of course, can also be obtained by petitions of course presented at the Rolls, by the solicitors of the parties, a course which, being found more convenient, is almost universally adopted; and secondly, because there are, under the new practice, many applications which used formerly to be motions of course, but which are now applications made by the solicitors of the parties to the judge's chief clerk in chambers, by summons. They are not strictly motions, but may be classed under that general head; applications for time to plead, answer or demur; to amend bills or claims; for enlarging publication, or the time for closing evidence; for payment into court of purchasers' moneys under sales by the court, and many others, are now made in chambers.

Special motions are motions addressed to the discretion of the court, acting either in open court or in chambers; that is, motions which may be granted as asked; or with modifications; or wholly refused; according to the merits. They are divisible into two classes, those which may be made *ex parte*, and those which require notice to be given to the party against whom they are made. Among the motions

which require notice, are motions made, on the coming in of the answer, for production of papers; for the payment of money into court; for the appointment of a receiver; in general for injunctions; or for stay of proceedings, being in the nature of, but not strictly injunctions; for committing a party for contempt of any order of the court, or in general for being relieved from the consequences of a contempt; for discharging any order made by the court; and generally it may be said, all motions which are susceptible of opposition on the merits, except in particular cases where notice would necessarily, or with the highest degree of probability, paralyse the power of the court to do justice to the party moving, if he was in fact in the right.

Special motions, which may be made *ex parte*, are motions for injunctions in really pressing cases; for a *ne exeat regno*; occasionally, though very rarely, for the temporary suspension of an order of the court. It is, however, very difficult, as observed by Mr. Daniell in his treatise (*Dan. Pract.* vol.2, p. 1452), to lay down any precise rule when notice may be dispensed with, where the question is not determined by the settled practice or the general orders of the court.

All special motions, whether *ex parte* or on notice, are made on the merits of the case, and must, therefore, be supported by evidence, which is always in the first instance by affidavits. An *ex parte* motion is made on a brief indorsed with instructions to counsel, stating what is the order asked, and accompanied by one or more affidavits verifying those facts on which the application is grounded, and by such parts of the pleadings as may be requisite to show the status of the party moving and of the party against whom the motion is made. An *ex parte* motion may be made on any day in or out of term, either when the court is sitting in public, or before the judge, wherever he may be found, if the court is not sitting; but it must be made before the judge to whose branch of the court the cause is attached; except during the regular vacations, when it may be made without special leave before the judge who executes the functions of vacation judge; or by leave before any judge who may be accessible, if there be no vacation judge. The term vacation judge, and the office of vacation judge, are rather customary than *positivi juris*, there being in strictness no such thing as one judge more bound than another to sit or be specially accessible during vacation. But in practice it has been the custom for many years during the long vacation, and sometimes also during the short vacations, for one of the judges to sit in private as vacation judge, and then such judge takes all applications

which may be made under the 13th Order, May, 1837, and the order of the 5th August, 1842. The more convenient method for practice, if not the most logical, will be to advert now to those classes of *ex parte* applications which are most frequent.

The most frequent of all is an *ex parte* motion for an injunction; this is never advisable except in cases of really pressing danger, as the court never deprives the intended respondent of the benefit of notice, unless it is satisfied that, if the order is not made at once, the mischief intended to be prevented will be so prejudicial to the party moving, that the court cannot afterwards set him right. In all other cases, the court always requires notice to be given, and then the costs incurred in the unsuccessful attempt to obtain an *ex parte* order will, in general, fall upon the party moving. *Ex parte* injunctions are frequently granted in cases of waste, properly so called, or of acts in the nature of waste, such as the improper erection or destruction of engineering or building works; of the threatened or reasonably apprehended misapplication of money held in a fiduciary character; in cases of nuisance, or of hasty sales *prima facie* improper; and of other acts of a like nature. They are rarely, though sometimes, granted in cases of invasion of patent or copyright; or of other invasions of rights resolving themselves into mere pecuniary rights, where the only injury done by the respondents, is one which may be compensated by an account and payment. An *ex parte* motion for an injunction cannot be made till a bill has been filed; (it will be recollected that an injunction bill may still be written on parchment and filed according to the old practice.) The motion should be supported by affidavits verifying all the material allegations of the bill. Usually the plaintiff is expected to make such an affidavit to the extent of his knowledge or belief, and if facts are alleged which are not in the positive knowledge of the plaintiff personally, they should be verified by the affidavit of the persons in whose knowledge they are. It is particularly material in preparing instructions for an injunction bill intended to be the foundation of an *ex parte* injunction, that the plaintiff's solicitor should thoroughly examine his client as to all the facts, as an *ex parte* injunction will be dissolved as of course on the defendant's application, without reference to the further merits shown on the part of the plaintiff on that application, if it appears that the court was, on the original motion, either misled or even kept in the dark, whether designedly or inadvertently, on any material fact, that is, on any fact forming part of the ground

of the order: (1 Myl. & Cr. 210, 211, *Hilton v. Lord Granville*, 4 Beav. 130); and the plaintiff must come to the court quickly on the discovery of his right: (*Barker v. North Staffordshire Railway Company*, 12 Jur. 589.) When the order is made, notice of it should be instantly, or with the least practicable delay, given to the respondent by sending to him a copy of the order as pronounced by the court, without waiting for drawing up the order regularly. In practice an order for an injunction, rarely is, though strictly it should be, drawn up regularly, for the defendant being bound to obey the order if he is in fact apprised of it in any manner, though he should not have been so apprised by the plaintiff himself, usually either obeys it, which makes all further proceedings unnecessary, or proceeds in the regular course to move to dissolve it, in which case drawing it up becomes equally unnecessary for practical purposes. If, however, the defendant does not at once obey the injunction, and does not give speedy notice to dissolve, the plaintiff should, without delay, proceed regularly to draw up his order and get the injunction sealed, and serve it on the defendant or his solicitor; for if he has not done so with due diligence after obtaining it, it will prejudice his right to obtain an order to commit the defendant for contempt for breach of the injunction; though it seems a party may be committed for an injunction without production of the writ: (*M. Neil v. Garratt*, 1 Cr. & Phil. 98.) When there is any doubt or difficulty about the completeness of acceptance, of service by the defendant's solicitor, an order for an injunction should be served personally on the defendant.

Before the 15 & 16 Vict. cap. 86, there could be no such thing as an ex parte motion for an injunction to stay proceedings at law except under the most special circumstances: (see *Drummond v. Pigou*, 2 Myl. & K. 168; *Mansfield v. Shaw*, 3 Mad. 100.) But the 58th section of that statute enacts "that the practice of the Court of Chancery for the stay of proceedings at law, shall, so far as the nature of the case will admit, be assimilated to the practice of such court with respect to special injunctions generally, and such injunctions may be granted upon interlocutory applications supported by affidavit, in like manner as other special injunctions are granted by the said court."

And by the 45th Order of August, 1852, "no injunction for stay of proceedings at law is to be granted as of course for default of appearance or answer to a bill." As under the statute and this order, injunctions to stay proceedings

at law appear to be entirely assimilated to special injunctions, that is, as they are only to be grantable on merits, it seems to follow that on sufficient merits, that is, not only a sufficient equity disclosed, but also a case made of pressing emergency, an injunction to stay proceedings at law might now be made on an *ex parte* application. However, bearing in mind that the court did before the act, possess *the power* to grant an injunction to stay proceedings at law on merits before any default by the defendant, but refused to exercise that power except under very special circumstances, it may be thought that the court will not now grant *ex parte* injunctions except in cases to which the principle laid down in *Drummond v. Pigou*, and *Mansfield v. Shaw* (cited *suprá*) would apply.

The next class of motions of importance which may be made *ex parte*, are motions for a *ne exeat regno*. An application for a *ne exeat* is an application to restrain a defendant from quitting the kingdom, on the allegation that the plaintiff has an equitable pecuniary demand against him, and on allegations of fact showing that he intends to depart, and will so evade his liability. It may also be granted on a claim for alimony, where there has been a decree for alimony not appealed from: (*Shaftoe v. Shaftoe*, 7 Ves. 171; *Street v. Street*, 1 Turn. & R. 322.) An application for a *ne exeat* is of necessity *ex parte*; since, if the facts of the bill are true, the defendant would, of course, defeat the motion by instant departure, if any notice, however short, were given to him. It must be supported, on the question of intention to depart, by affidavits pointing precisely and specifically to facts from which the court can itself infer whether there is or is not a reasonable probability that the respondent intends to depart.

Proved threats or declarations by the defendant of his intention to go abroad are sufficient; so will sometimes the plaintiff's evidence of belief, grounded on information derived from others who, from their position, could not be expected to come forward to make affidavits: (*Collinson v. —*, 18 Ves. 353.) But mere information of an intention of the plaintiff consistent with an intention of going or of not going abroad will not do: (*Oldham v. Oldham*, 7 Ves. 409; see also *Darby v. Nicholson*, 1 Dr. & War. 66.) On the other hand, facts evidencing an intention to depart, though there be no proof of declaration of such an intention will be sufficient: (*Amsinch v. Barklay*, 8 Ves. 594; *McGauran v. Furnell*, 1 Sauss. & Scul. 263.) Nor is it

necessary to show that the intended going abroad is with intent to avoid process; the principle is that if the *effect* will be to endanger the debt, the writ may be granted; but the affidavit must go to that: (*Stewart v. Graham*, 19 Ves. 313; *Boehm v. Wood*, 1 T. & Russ. 332.)

As to the existence of the debt, that must be positively sworn to, and the court must be satisfied that the deponent's knowledge is positive and personal, and not derived from information by others: (*Roddam v. Hetherington*, 5 Ves. 91; *Jackson v. Petrie*, 10 Ves. 164.) The affidavit must show a certain sum due, that is, either a specific sum actually due; or, if the bill is for an account, a certain balance due on taking the account. If, therefore, the plaintiff in the latter case will pledge himself to so much being due, he may have the writ (*Rico v. Gaultier* 3 Atk. 501; *Butler v. Butler*, "Beames on Ne Ex." p. 52; *Jackson v. Petrie*, 10 Ves. 164), but if he states the grounds of his belief, and the result of them is that so much as he swears is due, does not appear clearly to be due, then the motion will be refused (*Flack v. Holm*, 1 Jac. & W. 405); and see also as to necessity of stating the debt with certainty, *Whitehead v. Bennett*, 10 Jur. 3.

To support the application the plaintiff's solicitor must be provided with the Writ and Record Clerk's certificate of the bill being filed; a written bill *praying* a *ne exeat* may be filed (15 & 16 Viet. cap. 86, sect. 6); but as this only applies to a bill *praying* a *ne exeat*, a *ne exeat* applied for, as it may be, on a bill not *praying* the writ, must be on a printed bill. A motion for a *ne exeat*, like an *ex parte* motion for an injunction may be made at any time, in or out of term, and in open court, or before the judge wherever he is; but if the order is obtained in the absence of any Registrar, care should be taken to procure the order taken by counsel to be signed by the judge.

The order, when obtained, must be drawn up, passed, and entered, and then the plaintiff makes out the writ and procures it to be sealed by the Clerk of Records and Writs, who will seal it on production of the order.

The following is the form of the writ:—

VICTORIA, &c. To our Sheriff of _____, greeting.

Whereas it is represented to us in our Court of Chancery, on the part of A. B. complainant, against C. D. defendant (amongst other things), that he the said defendant, is greatly indebted to the said

complainant, and designs quickly to go into parts beyond seas (as by oath made in that behalf appearing), which tends to the great prejudice and damage of the said complainant, therefore in order to prevent this injustice, we do hereby command you, that you do without delay, cause the said C. D. personally to come before you, and give sufficient bail or security in the sum of £ , that he the said C. D., will not go or attempt to go into parts beyond sea, or to Holland without leave of our said court. And in case the said C. D. shall refuse to give such bail or security, then you are to commit him the said C. D., to our next prison, there to be kept in safe custody until he shall do it of his own accord. And when you shall have taken such security, you are forthwith to make and return a certificate thereof to us in our said Court of Chancery, distinctly and plainly, under your seal, together with this writ.

Witness, ourselves. &c.

The writ must be marked on the back for the sum named in the order made by the court.

The writ is delivered to the sheriff who executes it.

XIII. *Of motions made on notice.*

When an application by motion is of a kind which requires notice, the first step is the preparation of the notice of motion, which is usually prepared by the plaintiff's solicitor; the notice of motion is headed by the title of the cause, and is addressed at the foot to the solicitor of the respondent. It should state precisely on whose behalf and against whom the motion is to be made, as, in strictness, a motion brought on, without clearly stating these matters on the notice of motion, may be refused at once with costs. The court certainly leans against so strict a proceeding, and will frequently allow the motion to stand over for the notice to be amended; but there are not wanting instances where such motions have been simply refused with costs. The notice should also state accurately the particular relief intended to be asked, as a respondent has a right to know what claim it is that he is called upon to answer, and the court will rarely make an order departing materially from the order asked by the notice of motion. It is not, however, necessary in a notice of motion to ask for costs, unless the particular object of the motion is costs, such as to discharge a particular order with costs.

The following is the usual form of a notice of motion:—

In Chancery.

Between { A., B., C., and D., plaintiffs,
and
E. F., and others, defendants.

Take notice, that this Honourable Court will be moved by Mr. (1), before his Honour the , on (*insert the day*), or so soon after as counsel can be heard on behalf of the above named , that (*here insert the particular order intended to be asked.*)

Yours, &c.,
(*solicitor of the party moving.*)

To Mr. (*name of respondents' solicitor.*)

A notice of motion may, and sometimes ought to embrace several objects (*Hawke v. Kemp*, 3 Beav. 288.)

The notice of motion, being prepared, must be served on the respondent's solicitor two clear days before the day named in the notice for the motion to be heard; and regularly all notices of motion should be given for a seal day, that is, for one of the days fixed at the commencement of each sittings of the court for hearing motions. But if the matter is pressing, leave may be obtained by an *ex parte* application to the court, to serve notice of motion for any other day and with a less interval than two clear days of service.

Whenever leave is thus obtained to give what is called special or short notice, the notice of motion must express on the face of it, that it is by leave of the court given on such a day. If it does not, the respondent may either disregard it, or appear on the motion and ask that it may, on that ground alone, be refused with costs, and it will in general, be so refused.

A notice of motion may require to be served on other parties besides the particular party against whom the order is asked, whether a motion be by the plaintiff against one or more defendants, or by one or more defendants against plaintiffs, or by defendants against co-defendants; in either case the motion made against one party, may so involve the interests of other parties, as to give them a right to be heard upon it; and the general rule, therefore, as to who ought to be served with a notice of

(1) It is not necessary, but it is a frequent practice, to insert the name of the counsel who is to move.

motion is this, that every person a party to the suit whose interests are directly or indirectly affected by the motion, ought to be served with the notice. A motion will not, however, in general be refused merely because all necessary parties have not been served, but will be ordered to stand over to serve the necessary parties. The service, where the motion is for any process of contempt or commitment, must be personal. In other cases it is on the solicitor of the party affected. If, however, the party affected is out of the jurisdiction, leave must be obtained on a special application. As all motions requiring notice are made on merits, they must be supported by evidence; which is always in the first instance by affidavits. The usual and regular course is for the party who makes the motion to file affidavits verifying the facts on which he founds his motion. The affidavits must speak in the first person (126th Order, May, 1845), otherwise they will not be allowed in costs: (128th of same Orders.) It is not necessary that the party filing affidavits should give any notice of his having done so, as the respondent must search in the affidavit office from the date of the notice of motion. It is, however, not unusual in practice, and it is a practice conducive to the despatch of business, for the party moving to give notice to his opponent when he has filed affidavits. The respondent, when he finds that affidavits are filed by the other side, should immediately bespeak office copies of them from the affidavit office, and such copies must regularly be delivered out to him within forty-eight hours of their being bespoken: (127th Order of 1845.) Having obtained and perused copies of the affidavits, he may then take one or both of the following courses: he may either file affidavits in opposition; or he may content himself with cross-examining his opponent's witnesses *vivâ voce*; or he may do both.⁽¹⁾ If he cross-examines his opponent's witnesses, he obtains at the examiner's office an appointment, and he must give to the solicitor on the other side, forty-eight hours' notice of his intention so to cross-examine, and of the time and place of examination: (36th Order of August, 1852.) The witnesses must be served with a writ of *subpœna ad testificandum*, and it is presumed they should be served also forty-eight hours before the day fixed for the examination. The object of the respondent serving the

⁽¹⁾ I will here observe, once for all, that throughout this work authorities will not be cited for every proposition well established in every day's practice; but only, in general, in respect to matters either of exceptional practice, or where there is or has been some conflict or apparent conflict of authority.

opposite party is stated (by the 34th Order of 1852, which has reference to the witnesses examined for the hearing of the cause), to be that he may be present, which of course means for the purpose of re-examining the witnesses if he thinks fit; the 37th Order, which relates exclusively to cross-examination for the purpose of a motion, petition, &c., but not for the hearing of the cause, does not contain that express indication of intention; however, it refers to the 34th Order, and must, it is presumed, be taken to intend re-examination as well as cross-examination. The practice, at any rate, is that when a witness who has made an affidavit for an interlocutory application is called to be cross-examined in the examiner's office, the party for whom he made the affidavit is considered as entitled to re-examine him. The cross-examination and re-examination of a witness under such circumstances are conducted before one of the examiners of the court, (or if a special examiner is required and appointed, before the special examiner) in exactly the same manner as I have already explained in reference to an oral examination of the witnesses, after issue joined (see *ante*, p. 41 *et seq.*), and the record of the depositions is made up and transmitted to the Record Office by the examiner in the same way.

If the respondent also files affidavits in opposition, of which the party moving must inform himself by searching in the affidavit office from day to day (unless it has been arranged between the solicitors on both sides that mutual notice of filing affidavits shall be given), he may then file affidavits in reply to the respondent's affidavits, and in practice is allowed in such affidavits to go into new matter as well as matter strictly in reply; and the respondent may again file fresh affidavits in reply to the second set of affidavits, again going into fresh matter if he thinks fit, and so on; each party being at liberty to file affidavits against those last filed by his opponent, until both parties have thoroughly exhausted their evidence. On every fresh set of affidavits, the party against whom they are filed is entitled to cross-examine the witnesses *vivâ voce*. There is no limit to the right of filing affidavits, provided due diligence has been used by each party after the filing of his opponent's affidavits; and the court will never suffer a motion to be heard so long as either party has filed affidavits to which the other desires to reply before the motion is heard; for though strictly an affidavit, of which an office copy has not been obtained before a motion has been opened, cannot be read on that motion, yet the court will rarely shut out the evidence, but will order the motion to stand over for the other side to answer the affidavit if he

desires to do so. It is needless to observe that the result of this practice is that, if considerable discretion is not used by the solicitors of the respective parties, the evidence on motions will run to a very great and most frequently useless length, the expense arising from which may fall on either or both of the parties to the motion. In general, the party moving should carefully examine the affidavits filed in opposition to those which he has originally filed, and confine his affidavits in reply strictly to a reply to the evidence adduced by the respondent, and to such new facts as may be strictly relevant; and if the same rule is followed by the respondent in filing affidavits in further opposition, it must be a very exceptional case in which two sets of affidavits on each side will not entirely exhaust all the relevant evidence. When both parties have gone into all the evidence that they desire to tender, the motion may be heard and disposed of by the court.

On the hearing of a motion, the brief to counsel consists of a copy of the bill, the notice of motion, and of all the affidavits filed on both sides, and, if there has been any oral cross-examination and re-examination of the witnesses, of copies of the depositions, which are obtained from the examiner's office in the same manner as copies of depositions taken for the hearing of the cause. Also, if there are exhibits, that is, documents, accounts, models, or other things identified and sworn to by the affidavits, the exhibits themselves, or copies of such as are susceptible of being copied, should be furnished to counsel. The form of proving exhibits by affidavit is as follows:—"I have looked upon the exhibit marked (A.) now produced and shown to me at the time of swearing this my affidavit. It is (*here shortly describing it.*)" The particular thing that is to be proved is shown to the witness, who, having examined it, thus deposes in his affidavit or oral examination. The exhibit is then marked by the officer before whom the affidavit is sworn, or by the examiner if the proof is oral, and forms part of the evidence. Sometimes the pleadings, or parts of the pleadings form also a necessary part of the brief. The solicitors on both sides on the hearing of a motion should be provided with office copies of all the evidence, as strictly no affidavit can be used in court, unless an office copy has first been obtained, and in the event of any dispute as to what the witnesses have said, arising out of any inaccuracy in copying the evidence for the brief, the court will only look at office copies.

It occurs but rarely in practice that a motion involving any considerable amount of evidence can be heard on the

day for which it is originally fixed by the notice of motion ; but, unless by arrangement the motion stands over to a later day, briefs should be delivered always at the latest on the day preceding the day fixed by the notice ; and the respondent should in practice never fail in this.

A motion, according to its importance, may be intrusted to one or more counsel ; and for a motion involving any material and difficult question of law or practice, encumbered with any substantial amount of conflicting evidence, briefs to leading and junior counsel will always be allowed in taxation ; the principle is one of public policy, not of mere private convenience : (*Cooke v. Turner*, 12 Sim. 649.) Moreover, the parties are not bound, in reference to the costs allowed in taxation, to confine themselves to the counsel practising at any particular bar, and it is therefore presumed they need not confine themselves to the counsel practising in a particular court at the same bar. On a motion made in vacation, a special fee to the Attorney-General, ordinarily practising at the Common Law bar, was allowed in taxation, although it was in evidence that several leading counsel practising at the Chancery bar were in town, and accessible without a special fee : (*Nicholls v. Haslam*, 15 Sim. 49.) On the hearing of a motion, no affidavit can in strictness be received, unless an office copy of it has been obtained before the motion is opened. But the court is now so averse to shutting out any evidence which either party considers material, that it will in general, if affidavits have been filed by either party too late to be received, order the motion to stand over for the other party to reply, if he desires it.

Having thus given an outline of the proceeding by motion on notice generally, I shall proceed to discuss somewhat more minutely the particular motions of the most frequent occurrence ; and first of motions for and to dissolve injunctions.

Motions for Injunctions.

Motions for injunctions may be classed under two general heads : motions to stay proceedings in courts of law or in other courts, and motions to restrain the doing of acts *inter partes* of a wrongful character. Bills may be filed for general purposes *ultra* an injunction, or exclusively or mainly for an injunction ; but although a prayer for an injunction is inserted in most bills of a certain class, such as, for example, hostile bills for the administration of estates, or for any suit in the progress of which it is anticipated that at some

time an injunction may be required, in general, motions for injunctions are only made in suits where the injunction is either the only relief of importance, or the most material preliminary relief to be obtained. Of the latter class are suits for staying proceedings at law.

Much of the peculiarity of motions for injunctions to stay actions at law, as distinguished from motions for injunctions to restrain special acts of a wrongful nature, has been abolished by the 15 & 16 Vict. cap. 86, sect. 58, and the 45th Order of August, 1852, noticed *ante*, p. 56. Thus, no such motion can be now made as of course upon default of the defendant in not appearing or answering; but it must in every case be made upon the merits appearing on the evidence adduced on both sides; but if interrogatories have been filed, and the defendant meets a motion for an injunction by affidavits only, the plaintiff may be still entitled to an injunction till the answer has come in: (*Senior v. Pritchard*, 16 Beav. 473, and see *Lovell v. Galloway*, 17 Beav. 1.)

A motion for an injunction to stay proceedings at law is also rendered now more difficult to be obtained, by reason of the Common Law Procedure Act, 17 & 18 Vict. cap. 125, the 83rd clause of which enacts, that "it shall be lawful for the plaintiff or defendant in replevin in any cause in any of the superior courts, in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and these courts are hereby empowered to receive such defence by way of plea," &c.

This clause has recently in equity been made the occasion of refusing injunctions, on the ground that equity will presume that the Courts of Law will take notice of equities, which before the act could only be administered in Chancery; and therefore this court will now refuse to draw from the courts of law to its own exclusive cognizance many cases of which formerly it would have taken cognizance. Thus, in *Farebrother v. Welchman* (3 Drew. 122), the Vice Chancellor in his judgment said: "The equity set up, as I understand it, is this: a court of law will not recognise the validity of their pleas (pleas of equities by way of defence), unless the payments are such as in strict legal sense can be treated as set off. But, when I find that by the New Procedure Act a defendant is allowed to defend by matter of equitable defence, the very purpose of which enactment is to prevent a party against whom an action is brought from being driven to this court, it does appear to me that when a defendant

pleads such matter as I find here, I must assume that if the facts are found in favour of the defendant, judgment must also be in his favour ;” and an injunction, having regard to the effect of the Common Law Procedure Act, was accordingly in that case refused.

As it is not the province of this part of the work to go into a minute consideration of all the equities that will support, and are necessary to support, a bill to restrain proceedings at law, I shall here content myself with pointing out the general principles on which the court proceeds in such matters.

In order to support such a bill, the court requires, speaking generally, that it should be shown that there are matters in issue, which either by reason of the rules of the common law, or by reason of the forms of *procedure* of Courts of Common Law, cannot be dealt with at law so as to do complete justice. As an instance of the latter rule, if a marriage settlement is made and executed, at law the rights of the parties must be treated as definitively fixed by its terms ; and accordingly (unless the Common Law Procedure Act has introduced a different rule, on which point there is at present too little authority to justify the venturing even of a suggestion) a Court of Law would not allow as a defence to an action brought under any of the legal covenants contained in the settlement, that it was not made in pursuance of the intention and instructions of the parties ; but a Court of Equity would, on being satisfied that it was so made contrary to the intention, rectify it and cause it to be altered so as to carry out the instructions of the parties, and would accordingly grant an injunction to stay an action brought on any covenant not so intended to be inserted. So, as an instance of the former rule, though a court of law would be bound in an action of ejectment to allow as a defence the existence in the defendant of a term of years in the land, however inequitably obtained, because the term has the legal title, a Court of Equity would in many cases prevent such an action going on in that form, and prevent the defendant at law from using his inequitably acquired legal title. Again, the rule of the law is, that a deed under seal cannot be contradicted or modified by any less solemn instrument ; and, consequently, if a bond under seal were given, with a contemporaneous agreement merely under hand, to suspend or modify its effect at law, the parol agreement could not be looked at, and the obligor would be bound by the letter of the bond. But equity would restrain an action on the bond, having regard to the intention of the parties manifested by the parol agreement. So, if an obligation at law, joint and several, could be

shown to have been intended by the parties to be joint only, equity would restrain an action brought on it as a several obligation, though at law such an action could not be resisted: (*Other v. Iveson*, 3 Drew. 177.) Again, in questions of account, which are perhaps those in which most frequently injunctions to restrain actions at law have been and still are sought, although the Courts of Law have jurisdiction and will exercise it, yet, because the machinery of Courts of Law is in equity assumed to be not so completely adapted to take complicated accounts as that of Courts of Equity, an injunction will frequently be granted to restrain an action at law, where there is not only a cross account, but a complicated account. The principle on which Courts of Equity have interfered in matters of account has been in some cases assumed to be this—that the court will interfere wherever there are mutual accounts, that is, payments and receipts by each party for the other party. But that does not seem, according to a recent case (*Fluher v. Taylor*, 3 Drew. 185), to be the true principle. In this case the court said such was not the rule; that if it was, the case of an ordinary banking account would fall within it, and that the equity in each case must depend on the nature of the account: that it depended on this, whether the account is, not merely from number of items, but from its own nature, so complicated, that this court will say that such an account cannot be taken in a Court of Law. (See also *Taff Vale Railway Company v. Nixon*, 1 Cl. & Fin. 111, as to when equity will, and when it will not, interfere.)

The broad principle on which Courts of Equity interfere by injunction to restrain proceedings in other courts, is to be found in the case of *Duncan v. Mc Almont* (3 Beav. 409), in which an injunction was granted to restrain proceedings in the Admiralty Court, on the ground that that court could not so conveniently, directly, and effectually as this court, compel the defendants to do all that was necessary for the full and satisfactory investigation and determination of the rights of the parties. And this principle, although laid down in a case in which the proceedings sought to be restrained were in the Court of Admiralty, applies equally to proceedings in Courts of Law, or in other courts.

When a bill is filed praying an injunction to restrain proceedings at law, and a motion on notice is intended to be made, the general form of the notice is now the same as that of notice of motion for any other special injunction; the operative part refers to the particular action, and in general asks that *all* actions may be restrained; thus, where

an action has been brought on a promissory note, the notice will ask that the defendant may be restrained from prosecuting the said action, and from commencing or prosecuting any other action on the said note.

This notice is also, like other notices of motion for special orders, to be headed by the name of the cause, and addressed to the solicitor of the defendant. It must also be served two clear days before the day on which it is to be made, and should in general be for a seal day; but, by special leave, to be obtained on an *ex parte* application, it may be for any other day, and for a shorter date. The motion may be made without reference to whether the answer (if an answer has been required) has come in or not; and is supported by affidavits verifying the material allegations of the bill and any other facts supporting those allegations. Formerly, as observed already (p. 56), there was, with the rarest exceptions, no such thing as moving for a special injunction to stay proceedings at law before answer, though there might be regularly a motion for that purpose when the answer came in, upon the merits confessed by the answer; but then the motion was strictly upon the answer, and no affidavits could be read in support of the bill against it. But now, by the 59th section of the 15 & 16 Vict. cap. 86, "upon application by motion or petition to the court in any suit depending therein for an injunction or a receiver, or to dissolve an injunction or discharge an order appointing a receiver, the answer of the defendant shall, for the purpose of evidence on such motion or petition, be regarded merely as an affidavit of the defendant, and affidavits may be received and read in opposition thereto." This is general, and of course applies to a motion for an injunction to restrain proceedings at law.

The filing of affidavits and counter-affidavits, and replies and counter-replies, almost without end, may then take place in the manner pointed out in p. 62, in reference to motions generally; and the same rules of discretion which are there referred to for limiting the superabundance of affidavits, are recommended to the attention of the practitioner.

When a motion is made to restrain proceedings at law, it is in the discretion of the court to grant the injunction *simpli-citer*, or to refuse it, or to grant it on terms. In taking either of these courses, the court is guided as nearly as may be by the same considerations which formerly governed it in sustaining or dissolving the common injunction, when, after an order of course to dissolve, the plaintiff showed cause on the merits confessed in the answer why the injunction should not be dissolved.

Before the 15 & 16 Viet. cap. 86, the course of practice on injunctions to stay proceedings at law was this:—After the bill was filed, if the defendant, having appeared, made default in answering within eight days (the time allowed for answering an injunction bill), the plaintiff might obtain by an order of course the common injunction for staying the proceedings, that is, for staying all proceedings, if a declaration at law had not been delivered before the making of the order, and for staying execution only, if declaration had been delivered. The defendant, on putting in his answer, was then entitled to an order *nisi*, also obtained as an order of course, to dissolve the injunction, unless the plaintiff on a subsequent day showed cause why it should not be dissolved. On the day appointed for showing cause, it might be of two kinds; one that the answer was insufficient, the learning relating to which is now by reason of the assimilation of the answer to an affidavit wholly inapplicable even as a guide, and need not be further noticed; the second, was that on the case shown by the answer, taking it to be true, there was enough of the equity of the bill admitted, to show that justice could not be done if the injunction was not sustained.

The same principles which regulated the discretion of the court on showing cause against dissolving the common injunction, will now, it seems, govern it on the question of granting a special injunction to stay proceedings at law. In *Magnay v. The Mines' Royal Company* (3 Drew. 130,) the Vice Chancellor, referring to the ancient practice, said: "That practice is altered and the plaintiff is not entitled as of course to an injunction; on the contrary, he is bound to make a special application supported by affidavits, so as to show on the face of the evidence that the allegations of the bill are well founded; of course, this involves the consequence that the defendant has a right to oppose on affidavit. Now, it appears to me that the very intention of this alteration goes to show that in substance what the court has to determine on a motion of this sort is very much the same as what it had formerly to determine on showing cause against dissolving; that is, whether on the merits, looking at the whole, there is a fair question to be reserved to the hearing, and if there is, then whether in the meantime an injunction should be given, and on what terms."

Now, when under the old practice the whole equity of the bill was explicitly and fully denied by the answer, the injunction would clearly be dissolved (*Furnival v. Boyle*, 4 Russ. 142); and so it is presumed an injunction would now on the same principle be simply refused, if on the whole of

the evidence (the affidavits, and oral depositions, if any, on both sides) the equity of the bill is entirely displaced.

When an action has been brought to recover a sum of money due at law under some legal title, as rent or money due on a bond, a bill of exchange, or a promissory note, and a bill is filed to restrain the action on grounds of equity not cognizable or not so effectively cognizable in the action, the court will not in general grant an injunction *simpliciter*, if there is any fair doubt whether the equity can be maintained at the hearing of the cause, but will only grant it on the terms of the plaintiff (the defendant at law) submitting to judgment at law, to be dealt with as this court shall require, and bringing the money in the meantime into court. The order is then, that the defendant undertaking to deal with any judgment he may obtain as the court shall direct, is to be at liberty to proceed to judgment, but is not to sue out execution; and the plaintiff is ordered to pay in the money by a day fixed. Either actual notice of the order to the defendant, or constructive notice by the defendant or his attorney being present when the order is pronounced, or in court at the hearing of it, is sufficient to make it his duty to submit to and obey it; and there can be no doubt that any disobedience of the order would be held a contempt of the court, and subject the defendant to process of contempt, provided there is no subsequent delay, on the plaintiff's part, in getting the order drawn up and the writ sealed and served. For regularly a writ of injunction should be sued out without delay, after the order is made and duly served on the defendant. The service ought to be either on the party enjoined personally, or on some person substituted by an order of the court.

The principle of the practice above stated, as applicable to cases involving a mere claim for a money payment, applies generally; so that if the equity shown upon the result of the evidence on both sides is not so clear as to induce the court to see a probability, almost amounting to certainty, that it will be sustained at the hearing, it will not put the defendant (the plaintiff at law) in the position of losing the advantage of judgment at law and speedy execution, unless the plaintiff in equity gives satisfactory security that if he should in the end turn out to be wrong, the fruit of judgment shall not be lost to the defendant. It will, therefore, in such cases, put the plaintiff in equity on terms to give judgment in the action to be dealt with as the court shall direct; and it will impose such other terms as any peculiarities of the case may render necessary for securing to the

plaintiff at law the fruit which he would be entitled to reap from judgment at law, if it should turn out, on the hearing of the cause in equity, that the decree is hostile to the plaintiff.

Under the old practice, if a demurrer was put in to a bill, it was irregular to obtain the common injunction pending the demurrer; the course was for the court to order the demurrer to be argued immediately. As to motions for special injunctions, if a demurrer was put in, and then a notice of motion given, the practice was, on the day when the motion would be regularly brought on to hear the demurrer first; if the demurrer was overruled, then the motion proceeded; if the demurrer was allowed, of course the motion failed.

A motion for an injunction to stay proceedings at law standing now on the same footing as a motion for any other special injunction, the course of practice on this point will, it is apprehended, be a combination of the course under the old practice where the common injunction might, if there had been no demurrer, have been obtained, and of the course then taken where a motion for a special injunction was contemplated; viz., that the filing of a demurrer will be no bar to a motion for an injunction; but that the motion will not be *heard* until the demurrer has been disposed of; and that the court will, on the application to the plaintiff, direct the demurrer to be advanced to be heard with the motion whenever the motion may regularly be made and is ripe for hearing.

Under the old practice the common injunction might be obtained immediately, as of course, for default of answer, on the overruling of a demurrer; but on a motion for a special injunction of any kind, a demurrer being filed, the course was, first to hear the demurrer, and if that was overruled, then (as observed above) to hear the motion on the merits; for it did not follow that, because the bill was not demurrable, therefore, a special injunction, resting on the judicial discretion of the court, would be grantable. And this, it is presumed, must be also the practice now, as applied to motions for injunctions to stay proceedings at law.

It may here be noticed that, on a motion to dissolve an injunction, an objection may be taken that the bill is demurrable (*Hudson v. Muddison*, 12 Sim. 416), and it is presumed that in like manner such an objection may be taken without a demurrer actually filed, on resisting a motion for an injunction.

Injunctions to stay proceedings in other Courts.

Injunctions may also be obtained to stay proceedings in other courts, besides the Courts of Common Law, such as the Ecclesiastical Courts; the Court of Admiralty; in what are termed relatively foreign courts, such as the Irish Courts of Equity, the Courts of Scotland, and the subordinate and local Equity Courts of this country; and even in strictly foreign courts, that is, courts abroad. In fact, with certain exceptions which will be noticed, it is difficult to say to what the jurisdiction of equity to restrain any proceedings in other courts do not extend; because the jurisdiction is founded, not on any right of interference with the foreign tribunal itself, a right which the Court of Chancery wholly disclaims, but on the right of the court over the person of any suitor, who is personally, or in respect of his property, within the local jurisdiction of this court, to restrain him from doing that which is inequitable. The authorities on this point are numerous and explicit: (*Hill v. Turner*, 1 Atk. 516; *Jarvis v. Chandler*, 1 Turn. & R. 319; *Glasscot v. Lang*, 3 Myl. & Cr. 451; *Lord Portarlington v. Soulby*, 3 Myl. & K. 104; *Clarke v. Earl of Ormonde*, Jac. 108.)

The exceptions to the exercise of this jurisdiction of the court are as follows:—The court has not jurisdiction to restrain proceedings in an award—where the submission to arbitration has been or may be made a rule of a Court of Law: (see *Nicholls v. Roe*, 3 Myl. & K. 431.) It has not jurisdiction to interfere against obtaining probate of a will of personality in the Ecclesiastical Court on the ground of fraud or otherwise: (see *Allen v. McPherson*, 1 Phil. 133, in which the learning bearing on this matter is collected in the judgment.) Possibly in a case of fraud in obtaining a will, or a benefit under a will, the jurisdiction of the court might attach on the fraudulent donee, the character of a trustee for other parties; but this even seems very doubtful: (*Hindson v. Weatherill*, 18 Jur. 499.) The court will not interfere to prevent proceedings in Parliament *after* the reception of a bill by either House (*Attorney-General v. Manchester and Leeds Railway Company*, 1 Rail. Cas. 436), and semble, that it has not even jurisdiction to restrain parties from *petitioning* the Legislature: (1 Rail. Cas. 458.) These are, I believe, all the cases of strict exception to the jurisdiction of the Court of Chancery to restrain proceedings in other courts.

Injunctions to restrain wrongful acts.

The principal heads of the equity for granting injunctions to restrain wrongful acts *inter partes*, as distinguished from inequitable proceedings in other courts are, waste ; infringement of copyright, and of patent rights ; the inequitable publication of secret inventions ; the inequitable use of names or trade marks ; nuisance ; breach of agreement generally ; and, in particular, breach of Parliamentary agreement, that is, infraction of the clauses of acts of Parliament, which are treated as contracts between the public and the individuals in whom powers are vested by the act.

On filing bills and moving for injunctions in all these matters, the general course of proceeding is the same, and is that which has been already pointed out in this section in reference to motions on notice generally, and to motions under the modern practice to restrain proceedings at law in particular. But in respect to some of these motions, there are a few peculiarities arising out of the nature of the subject, which require to be borne in mind. Thus, as to the evidence in support of them, in all cases the merits must be verified by evidence in support of the bill. That is, the title of the plaintiff and the acts of injury must be proved ; but in support of a motion by a patentee, there is this peculiarity ; if it is made *ex parte*, the plaintiff must swear not merely that he believed himself to be the true inventor at the time when he obtained the patent, but that he so believes *at the time of making the affidavit*. That is quite settled : (*Sturg v. De la Rue*, 5 Russ. 322.) It is not, however, quite settled that when he moves *on notice*, such an affidavit is necessary : (*Neilson v. Thompson*, 1 Web. Pat. Cas. 276, n.(a) However, in the present state of the authorities, the prudent practitioner will not dispense with the affidavit being in conformity with *Sturg v. De la Rue*. On a motion for an injunction to restrain infringements of copyright, it is not strictly necessary to prove a legal title ; an equitable right to have a legal title is sufficient (*Sweet v. Shaw*, 3 Jur. 217 ; *Sweet v. Cater*, 5 Jur. 68 ; *Chappell v. Purday*, 4 Y. & Coll. Eq. Exch. 485 ; *Bohn v. Bogue*, 10 Jur. 420), and if proceedings at law are directed, the defendant will be put on terms to admit the legal title of the plaintiff ; but if the plaintiff is an assignee of the copyright, the assignment must be proved : (*Power v. Walker*, 3 Mau. & Selw. 7 ; *Davidson v. Bohn*, 12 Jur. 922.)

This distinction also is to be noticed. In all those cases in which the plaintiff claims under a purely legal title or right, as in cases of patent or copyright ; nuisance ; breach

of a legal contract, &c., the court may or may not grant an injunction; but it never will grant an injunction without putting the legal right (if the defendant desires it) in course of trial at law: (see *Bacon v. Jones*, 4 Myl. & Cr. 433; *Harman v. Jones*, 1 Cr. & Phil. 299; *Swallow v. Wallinford*, 12 Jur. 403; *Sancster v. Foster*, 1 Cr. & Phil. 302. *Wilson v. Tindal*, Web. Pat. Case, 730, does not seem on this point to be law.)

On a motion, therefore, for an injunction to restrain infringement of patent or copyright, or of any other right being a purely legal right or title in the plaintiff, he must always be prepared to undertake, as the price of an injunction, to take proceedings at law to establish his title, if it is questioned by the defendant. But this rule does not apply to subjects of injunction where the contest rests on purely equitable principles. Thus, in a case of alleged fraudulent imitation of a name, or of trade marks, or of the fraudulent publication of secret inventions, the ground of interference is not properly the title of the plaintiff, which may or may not be a right of property, but the fraud of the defendant; and the court grants or refuses an injunction without requiring or advertg to any proceedings at law: (see the cases of *Perry v. Truefit*, 6 Beav. 66; *Croft v. Day*, 7 Beav. 84), so in the case of *Attorney-General v. Strange*, (1 Macn. & Gord. 25; see p. 48); although the injunction was granted on the principle of a *prima facie* right of property in the plaintiffs in the description of their unpublished etchings, yet the court refused to direct proceedings at law, because, independently of that ground, the defendant was guilty of fraud, and that alone was sufficient to support an injunction, whether the legal title was sustainable or not.

Of opposing motions for injunctions.

The mode of conducting the opposition to a motion for an injunction is very simple. When the defendant's solicitor has been served with the notice of motion, he procures office copies of the affidavits filed by the plaintiff, and to these he may either reply at once by affidavits contradicting them; or he may content himself with cross-examining the plaintiff's witnesses in the examiner's office; or he may take both courses concurrently. If the time given by the notice of motion is not, as it rarely is, sufficient for either of these purposes, he gives his counsel a brief to oppose the motion, consisting of the bill and the notice of motion, and instructs him to appear and ask for time to answer the affidavits, which

is granted as of course. Whenever, by the process already pointed out (p. 62), both parties have thoroughly exhausted all the evidence that they can procure, the defendant will then allow the motion to come on. If the order for an injunction is made, his course is either to submit to it, if he is advised that the judgment will be maintained, or to appeal. For a motion to dissolve an injunction before the judge who granted it is, in practice not to be made when the injunction has been granted after hearing both parties, but only when the injunction has been granted *ex parte*.

The proper course for getting rid of an injunction obtained *ex parte* is to move on notice to dissolve it. A motion to dissolve an injunction is prepared and conducted on the same principles, and as nearly as may be in the same manner, as a motion for an injunction. The formal parts of the notice are the same as on notice of motion; the operative part being "that the order made by this Honourable Court on the () day of (), may be discharged, or otherwise may be varied as this court shall think fit." The defendant's solicitor, in preparing for the motion, procures office copies of the affidavits filed in support of the original motion, and replies to them, and he may also cross-examine upon them if he thinks fit; and the motion comes on when, and not till, both parties have filed all the affidavits that they deem requisite.

Under the old practice, whether on moving for or to dissolve an injunction, and whether the injunction was to stay proceedings at law or a special injunction *inter partes*, there was much intricate learning on the subject of what affidavits might and what might not be read, when the defendant had filed an answer; making it sometimes of great practical importance on behalf of a defendant to file an answer as quickly as possible, whether it was to meet a motion for an injunction or to support a motion to dissolve. For if the title to file a bill rested on allegations which could be positively denied by the defendant by his answer, in general the plaintiff could read no affidavit against the answer, and the answer, however much it might be in conflict with evidence which the plaintiff might be ready to adduce, put him at once out of court. But there were a variety of fine distinctions limiting or modifying this right of the defendant. All this intricate learning and its consequences on the practical steps to be taken, are however now rendered unnecessary and inapplicable by the 59th section of the 15 & 16 Vict. cap. 86, providing that "upon application by motion or petition to the court in any suit depending

therein for an injunction or a receiver, or to dissolve an injunction, or discharge an order appointing a receiver, the answer of the defendant shall, for the purpose of evidence on such motion, be regarded merely as *an affidavit of the defendant*, and *affidavits may be received and read in opposition thereto.*"

It is therefore now, subject to the doctrine of the two cases cited in p. 65, quite immaterial to the defendant, having to resist a motion for an injunction, whether to restrain proceedings at law or for any other purpose, when he files an answer; or, indeed whether, he files an answer or not, or only affidavits; and it is equally immaterial to the plaintiff whether the defendant has or has not filed an answer; or, if he has, whether it was filed before or after any of the plaintiff's affidavits; or whether it goes to matter of title or only to matter of fact: (see on the old learning, *Norway v. Rowe*, 19 Ves. 147; *Manser v. Jenner*, 2 Hare, 600; *Lloyd v. Jenkins*, 4 Beav. 230; *Rocke v. Mathews*, 12 Jur. 643, and 2 De G. & Sm. 227.)

The 59th section of the 15 & 16 Vict. cap. 86, only speaks of affidavits, and does not in express terms say that oral evidence may be read against the defendant's answer; but since it entirely reduces the answer to the condition and value of an affidavit, and since oral evidence may clearly be read against any ordinary affidavit, it is presumed that no objection could be taken to the reception of oral evidence against an answer, and the unchallenged course of practice has been, since the 15 & 16 Vict. cap. 86, to treat all the evidence on both sides, whether answer, affidavit, or oral evidence, as equally admissible.

It may be useful here, although it is not usual in books of practice to go into such matters, to allude to the particular kind of special evidence that should be procured on some motions for and to dissolve injunctions touching wrongful acts *inter partes*, particularly as on the most usual of such motions, the evidence has not unfrequently to be prepared in great haste in the country, without an opportunity being afforded to the solicitors of the parties of advising with counsel on the evidence.

On a motion for an injunction to restrain the infringement of a patent, of course the allegations of the plaintiff's title must be particularly, and the allegations of acts of infringement must be generally, verified by the affidavits. But as the defence to infringement of a patent is generally in addition to any legal objection to the title, and whether the legal title to the patent is or is not principally relied on,

that there is some considerable distinction between the machinery or process used by the defendant and that used by the plaintiff, the evidence of competent men of science, or practical knowledge, should always be obtained to show the *similarity* of the two machines or processes. When the subject-matter of the invention is machinery, if there is in it any degree of complication, it should be exemplified by an actual machine, or by a working model, proved as an exhibit, as the explanations afforded by the specification and plans filed by a patentee, however intelligible to practical mechanics, are not always understood by judges and counsel. The peculiar character, that is, the specific feature of novelty and merit of the patented invention should always be distinctly and prominently brought forward in the affidavits. And the affidavits should not use purely technical terms of art, without explanation; for though judges and counsel are usually possessed of considerable scientific information, they are not and cannot be expected to be acquainted with the particular technical terms used by mechanics and other persons practising special arts; and it not unfrequently happens that the rights of the patentee or his opponent, as the case may be, are perilled or lost by reason of the inadequacy of the affidavits to explain and present clearly to the mind of the court, the particular things and operations intended to be designated by the witnesses.

In support of a motion to restrain infringement of copyright, in addition to the general and what may be termed formal evidence of title and infringement, the plaintiff's solicitor should always carefully examine the piratical work and compare it with the original, and procure evidence to show particular similarities, and especially similarity of *errors*, a point much relied upon by the decided cases as showing plagiarism. All models, books, drawings, and other things intended to be produced to the court as evidence of *things*, in addition to the depositions as to *facts*, must of course be proved as exhibits.

Oral evidence *in court* cannot be taken on motions for injunctions (nor indeed on any interlocutory applications) except by consent; the 40th section of the 15 & 16 Viet. cap. 86, which is applicable to interlocutory proceedings, applying only to oral examination before *an examiner*; and the 39th, which authorizes the taking of oral evidence by the court itself, applying only to the *hearing of the cause*; this point is not, I believe, to be found laid down in any reported case, but it has been repeatedly so held, and the practice is accordingly.

When a motion is made for an injunction to stay wrongful acts *inter partes*, on an *ex parte* injunction having been granted, and a motion is made to dissolve it, the court sometimes grants or sustains the injunction with or without conditions; and sometimes refuses it, but puts the defendant on terms. On a motion to restrain infringement of a patent, the usual course is, if the patent is of long standing, and particularly if its validity has already been successfully maintained at law, to grant an injunction, putting the plaintiff on terms to bring an action, if the defendant disputes the validity of the legal title, and desires an action. If the patent is but of recent date, and has not been tried at law, the more usual course is to make no order either for or refusing an injunction; but to direct the motion to stand over, with liberty to the plaintiff to bring an action, and to put the defendant on terms to keep an account in the mean time. In cases of copyright, the direction of a trial at law is in practice less frequently to be anticipated; copyright being a patent legal title, which only in exceptional cases can be the subject of doubt, so that proceedings at law are in general only directed when the *fact* of imitation is on the evidence so far doubtful that a Court of Equity considers it necessary to send it to a jury. But when the validity of the legal title is called in question, as in the case of *Ollendorf v. Black* (4 De G. & Sin. 209), the course of the court in respect of copyright is the same as in respect of patent right. In cases of nuisance, the right of the plaintiff rests not on his own special legal title, but on the illegality of the act of the defendant. An injunction is therefore, in such cases, sought rather in opposition to a *primâ facie* legal right in the defendant, than in support of a *primâ facie* legal right in the plaintiff. And accordingly, in this class of cases, the court not only *never* grants an injunction without directing proceedings at law, but very rarely will grant it until the nuisance has been established at law. In *Walter v. Selfe* (15 Jur. 416), the court by consent decided the question of nuisance without the preliminary establishment of the nuisance at law. But I am not aware of any case in which this course has been taken adversely.

The court may still, and sometimes does, on a motion for an injunction, direct an issue of fact to a court of law, instead of an action; but it has no longer power to direct a *case* for the opinion of a court of law: (61st section of the 15 & 16 Vict. c. 86.) This and the subsequent section of the act have been considered by the Profession as calculated to lead to the determination by the court, on motions for in-

junctions in aid of legal rights, of the legal question between the parties. The 62nd section is as follows:—"In cases where, according to the present practice of the Court of Chancery, such court declines to grant equitable relief until the legal title or right of the party or parties seeking such relief shall have been established in a proceeding at law, the said court may itself determine such title or right without requiring the parties to proceed at law to establish the same."

I am not aware, however, of any case in which the court has strictly acted on this section, and until there shall be authority on the subject, the practitioner must rather assume that the Courts of Equity will not go further than they did before the statute, in dispensing with the assistance of a Court of Law to determine legal titles, in respect of which equitable relief by injunction is sought.⁽¹⁾

The course of proceeding as to giving notice to the respondent when an order for an injunction is made, and with respect to the drawing up and serving the order, and obtaining and serving the writ of injunction, has been already pointed out (p. 70.) When the order is made, the costs are always made costs in the cause.

If a motion is successful, but afterwards the bill is dismissed with costs, the defendant will have, as part of his costs, the costs of opposing the motion, because the result shows that the motion never ought to have been made: (*Stevens v. Keating*, 1 Macn. & Gord. 659.)

If a motion is refused, it will most frequently be refused with costs; and then the costs must be immediately paid by the plaintiff, that is, the payment will not be postponed until the general costs of the suit are disposed of; and a motion for several purposes will be refused with costs if the principal one fails. (*Sturch v. Young*, 5 Beav. 557); but, if the circumstances between the conflicting parties are so nearly balanced that the injunction is only refused on the ground that more injury would be done by it to the defendant, if he should turn out in the end to be right, than would be done to the plaintiff by refusing it if he should ultimately turn out to be right; or if there is any miscon-

⁽¹⁾ In a case of *Thomas v. Langridge*, heard before Vice Chancellor Wood, August 1853 (in which the writer was counsel for the plaintiff), the court, after argument on the above clause of the act, refused to decide the legal question, and directed an action; although there was no material dispute as to the facts, and the sole question was the legal title to the patent.

duct on the part of the defendant, of which the court wishes to mark its disapprobation, although it cannot withhold from him his right to be free from an injunction, costs will not be given to him, but the motion will either be refused simply without costs; or the costs will be expressly reserved. If the motion is refused simply without anything said about costs, the costs will in effect be costs in the cause, because the costs of the motion will be a part of those general costs which have been incurred; and will follow the general decision; that is, if in the result the plaintiff obtains a decree, or if the case is sent to law, and he there succeeds, and comes back for and obtains an injunction, then he will, it is presumed, have the costs of the original motion, although he was primarily unsuccessful in it, on the principle of *Stevens v. Keating*, because he ought to have had the injunction; but if in the result the bill is dismissed, then the motion ought never to have been made, and the defendant will have the costs. But if the court expressly reserve the costs, then I apprehend, on the authority of *Stevens v. Keating*, it will deal with those costs at its discretion when the general costs are disposed of. It is true that in *Gardner v. Marshall* (14 Sim. 575), the V. C., Sir L. Shadwell, held otherwise; in that case, the costs of a motion had been reserved till the hearing; at the hearing, the costs of suit were reserved, and on further directions the plaintiff was ordered to pay the *costs of the suit*. The V. C. refused to include the costs of the motion, because a reservation of *costs of the suit* was not a reservation of *costs of a previous interlocutory motion*. But *Stevens v. Keating*, above cited, proceeds on the principle, that if the result shows that a bill was wrong *ab initio*, a motion made in it was also wrong, and therefore the costs of it ought to be paid to the party who never ought to have been vexed with the motion.. And *Finden v. Stephens*, (11 Jur. 898), which Sir L. Shadwell decided on the same ground as *Gardner v. Marshall*, viz.: that costs of interlocutory applications are not costs of suit, was overruled on that very point by Lord Cottenham: (see 12 Jur. 319.) It is apprehended, therefore, that *Gardner v. Marshall* is not law, and that the practice is as I have stated it.

When a motion is ordered to stand over, the costs follow the decision, and stand over too, and all discussion about them is postponed till the motion is renewed; and if a motion stands over at the defendant's instance, he having filed a demurrer, and that demurrer is afterwards overruled, and the plaintiff is ultimately ordered to pay the *costs of*

the suit, he will have to pay the costs of the motion: (*Finden v. Stephens*, 12 Jur. 319.)

If a motion is refused so that it is gone, and then a new motion for the same object, on a *fresh notice of motion*, is made, the old affidavits, if intended to be used, must be either re-sworn, or notice must be given that they will be read, otherwise they cannot be used; and if the renewed motion rests on those affidavits only, in strictness it must be refused with costs. But probably now the court would order it to stand over on payment of any extra costs occasioned by its standing over, for the affidavits to be re-sworn.

It has been pointed out (in p. 53), that many motions which used to be made in court are now made on summons in chambers. Some of these applications may be made *ex parte*, and some must be made on notice. Applications for time to amend bills may be made at any time before any answer is filed, or after an answer, merely for the purpose of rectifying some clerical error in names, dates, or sums, as often as the plaintiff desires it, as under the old practice (Orders 64, 65 of 1845), as of course, and therefore *ex parte*; but if there are several defendants, and any one has answered, the plaintiff can only have one order of course to amend. After an answer is filed, one application of course may be made for leave to amend within four weeks after the answer of a sole defendant, or if there are several defendants, after the last answer is found or is to be deemed to be sufficient. An order of course to amend is not obtained by summons in chambers, but by a motion or petition of course, as explained in p. 13. It has been inadvertently stated in pp. 12 and 15, that an order to amend of course, is obtained on summons, after the plaintiff has exhausted his right to amend as of course, that is, after one amendment where an answer has been put in, any further amendment must be by special order, and must be on notice. Applications for time to plead, answer or demur, not demurring alone, must also be on notice; so must applications to enlarge publication or the time for closing evidence. Applications for payment into court of purchase-money under sales by the court may be made *ex parte*.

The following is the list of the applications which should be made at chambers at the Rolls:—and I believe the other branches of the court adopt the same practice.

1. As to the guardianship of infants (except the appointment of guardians *ad litem*.)
2. For the appointment of a special guardian to concur in a special case.

3. As to maintenance or advancement of infants.
4. Under the Drainage Act: (see on this the General Order of the Court of 4th March, 1846.
5. Under the Trustee Acts 1850 and 1852: (see the General Order of 10th June, 1848.)
6. For the administration of estates under the 15 & 16 Vict. c. 81, see sects. 45, 46, and 47.
7. Under the Legacy Duty Act for payment of money out of court.
8. For time to plead, answer or demur.
9. For leave to amend bills or claims.
10. For enlarging publication or the time for closing evidence.
11. For the production of documents.
12. Relating to the conduct of suits or matters.
13. As to matters connected with the management of property.
14. For the payment into court of purchasers' moneys under sales by order of the court, and investing the same, see the notice issued from the Master of the Rolls' chambers, 10th November, 1852.

To these may be added applications for substituting a purchaser; to determine questions in dispute under conditions of sale; to make abatement in purchase money by means of defect of title; to approve of contracts for sale by private contract; to appoint a receiver when there has been an order for such appointment, or without any such order, by consent; to make stop orders by consent.

Of these different kinds of applications, all except No. 14, and the appointment of a receiver by consent, appear of their nature to require notice; on this point, however, in chambers as well as in court, the general rule must be borne in mind, that whenever any party, other than the applicant, may be interested in the order not being obtained, or being obtained with a variation, notice will be requisite.

Every application in the nature of a motion in chambers is made upon a summons taken out in chambers upon application to the judge's chief clerk; and if it is one which requires notice, the summons must be served on the solicitor of the respondent two clear days before the return, that is, two clear days exclusive of the day of obtaining the summons, and the day on which it is to be heard: (5th Order, 16th October, 1852.)

A summons in the nature of a motion on notice must, like a motion in court, be supported by affidavits (see the 23rd Order, 16th October, 1852); and the parties respectively

and the judge may then sign such certificate; the certificate may be to cross-examine and re-examine the affidavit witnesses orally, but such oral examination takes place in the judge's chambers before the judge's chief clerk, or before the judge, as the case may be, instead of before one of the examiners of the court.

The party intending to use any affidavit on any proceeding in chambers, is to give notice to the other parties concerned of his intention in that behalf: (24th Order of 16th October, 1852.)

The mode of proceeding is the same as before an examiner, pursuant to the 26th Order of the 16th October, 1852, which directs "that when a chief clerk is directed by the judge to examine any witness, the practice and mode of proceeding is to be the same as in the case of the examination of witnesses before the examiner, subject to any special directions which may be given in any particular case." The only difference adopted in practice is, that by a rule laid down by the judges, counsel cannot be heard either to argue or examine witnesses before the chief clerk; of course they may if the examination is before the judge in person.

It may be doubted whether the judges had any jurisdiction to lay down such a rule as to examination of witnesses, except by a General Order, without at any rate first rescinding the 26th Order of the 16th October, 1852, if at all; as the 31st section of the 15 & 16 Vict. cap. 86, directs expressly that the oral examination of parties under that act shall be in the presence of the parties, their *counsel*, solicitors, or agents; the 30th section of the 15 & 16 Vict. cap. 80, gives to the chief clerk for the purpose of any proceedings directed by the Master of the Rolls or any Vice-Chancellor to be taken before him, full power "when so directed by the judge to whose court he is attached, to examine parties and witnesses, either upon interrogatories or *vivâ voce*, as such judge shall direct." Bearing in mind also the 28th section, which directs the mode of proceeding before the judges at chambers to be as near as may be according to the form adopted before the Judges of the Common Law at Chambers, before whom the suitor is of right entitled to be heard by counsel, it seems very questionable whether the Legislature did not intend by the two statutes of the 15 & 16 Victoria, that whenever and wherever a witness is directed to be examined *vivâ voce*, the party should of right be entitled to the assistance of counsel. The practice, however, is settled as above pointed out.

The substance of the evidence in support of any application in chambers should be the same as would be required if the motion were made in court. Thus, to support a special application for leave to amend a bill after answer, there must be an affidavit, pursuant to the 67th Order of May 1845, viz., that the draft of the proposed amendments has been settled, approved, and signed by counsel, and that the amendment is not intended for the purpose of delay or vexation, but because the same is considered to be material for the case of the plaintiff. And after replication, or an undertaking to file replication, the application must be supported by a further affidavit showing that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into such bill: (68th Order, 1845.) The affidavit should be made by the plaintiff and his solicitor, unless the plaintiff is abroad, or for other reasons is unable to join, and then it may be made by the plaintiff's solicitor alone. In general, the affidavit of materiality need not state the actual amendments, but it should state enough to enable the judge (or his clerk) to determine whether the amendments are material. The words of the Order are, an affidavit "showing," and a mere naked averment on oath that the amendments are material, is not sufficient, without setting forth such matters as will enable the court to judge of the case, and the same rule applies to the question of *reasonable diligence*; the affidavit must state facts, and not merely follow the words of the 68th Order: (*Stuart v. Lloyd*, 3 M. & Gord. 181.)

When the matter brought before the chief clerk has been heard, he makes his report or certificate to the judge, which report, when prepared and settled, is to be transcribed by the solicitor prosecuting the proceedings, in such form and within such time as the chief clerk shall require, and is then to be signed by the chief clerk at an adjournment to be made for that purpose. But where, from the nature of the case, the certificate can be drawn and copied in chambers, whilst the parties are present before the chief clerk, the same shall be then completed and signed by him without any adjournment: (46th Order of 16th October, 1852.)

And the party dissatisfied with the certificate, has four days after the signing of the certificate by the chief clerk, to take the opinion of the judge upon it (47th Order of 16th October, 1852); within which four days he must obtain a summons so to take the opinion of the judge; if he does not, at the expiration of the four days, the chief clerk is to submit his certificate to the judge for his approval,

and the judge may then sign such certificate; the certificate thus signed becomes the order of the judge. Until then, it is no order at all; in fact, the chief clerk never makes any order, properly so called: (*Hayward v. Hayward*, 1 Kay, App. 31, see p. 33.) The certificate signed by the judge is then to be transmitted by the chief clerk to the Report Office to be there filed: (50th Order, 16th October, 1852.)

The order will be drawn up by the chief clerk, and must be entered in the same manner and in the same office as orders made in open court: (28th Order of 16th October, 1852.) If any party is dissatisfied with the order so made, he has eight clear days from the filing of it to apply by summons or motion to discharge or vary it: (51st Order of 16th October, 1852.)

If the matter, having been heard by the chief clerk, is not, within the four days, brought before the judge for his opinion, but is signed by the judge formally, but without his having heard the matter personally, the course of objecting to it is by summons or motion before that judge to discharge or vary it; and then the judge either hears it in chambers, or adjourns it to be heard by himself in open court. But if the judge's opinion has been taken upon it on the clerk's certificate, then, as it is the *substantial decision* of the judge as well as his *formal order*, the course is to move to review his decision, not before the same judge but before the Court of Appeal, in the same manner as on an appeal motion.

The original examinations and depositions of the parties and witnesses taken by or before the chief clerk, and authenticated by his signature, are to be transmitted by him to the Record and Writ Office to be there filed, and any party to the suit or proceeding may have a copy thereof, or of any part or portion thereof, upon payment of the proper fee.

Of any further specialties peculiar to proceedings by summons, more will be said in its place in the chapter treating of proceedings in the judges' chambers generally.

Of motions for production of documents.

A motion for production of documents upon the admissions in the answers, may still, as already pointed out in p. 33, be made, notwithstanding the new practice under the 18th section of the 15 & 16 Vict. c. 86. However, the convenience of that new practice is so great, that such motions in court made upon the answer are becoming every day less necessary, and, therefore, less usual. A motion for pro-

duction of documents upon the admissions in the answer, must be made on the usual two clear days' notice of motion; and the notice is in the usual form as to its merely formal part. The operative part is as follows:—"that the said defendant may be ordered to produce and leave in the hands of the Clerk of Records and Writs the several deeds and papers and writings admitted by his answer in this cause, and the schedules thereto, to be in his custody, possession, or power; and that the plaintiff may have liberty to inspect and take copies of the same, and that the Clerk of Records and Writs may be ordered to attend with the same before the examiner, or at the hearing of the cause."

The motion must be strictly on the admissions in the answer, and cannot generally be supported by any affidavit contradicting it. And the answer must contain a clear admission, not only that the documents are in the possession and power of the defendant (see *Storey v. Lord J. G. Lennox*, 1 Myl. & C. 25), but that they relate to the matters in the suit; and it must also contain an admission of the title of the plaintiff (*Adams v. Fisher*, 3 Myl. & Cr. 526), otherwise a motion for production will fail. A motion cannot be sustained for production of documents against a trustee of them, unless all the *cestuis que trust* are parties to the motion (*Ford v. Dolphin*, 1 Drew. 222); nor if the defendant swears that they relate exclusively to his own title, and do not relate to the title of the plaintiff; nor for production of documents in the hands of the defendant's solicitors, as solicitors for him and for other parties who are not before the court (*Cridland v. Lord de Mauley*, 13 Jur. 442); but by the title of the plaintiff must be understood, not his title in the ordinary sense of the word, that is, his *proprietary* title, but his title to the particular relief founded on the particular allegations of the bill. Thus, where the bill was for a commission to ascertain boundaries and alleged acts of the defendant obliterating or tending to obliterate the boundaries, and that quays and wharfs had been built, and acknowledgments had been made to the defendant by the occupiers thereof of the plaintiff's right, and the defendant admitted to be in his possession surveys and maps relating to the matters in the bill, but swore they related to the evidence of title of the defendants, and did not form part of the title of the plaintiff to the premises; the Lord Chancellor, Lord Lyndhurst, said that it was not sufficient. From the nature of the documents they might evidence the title of the plaintiff to a commission, though not his title in the ordinary sense of the word; and the document was ordered to be produced; (*M. of Bute v. Glamorganshire*

Canal Company, 1 Phil. 681.) And the answer must be positive; mere statement of information and belief, or qualified statements, will not do (*Edwards v. Jones*, 1 Phil. 501); and if the answer admits that the documents relate in any degree to the title of the plaintiff, although they may relate partly or even principally to the title of the defendant, an order for production will be made. It was held in *Alder v. Campbell* (1 Beav. 261), that where the answer neither admits nor denies, but ignores either the possession of particular documents or their relation to the title of the plaintiff, the motion may be supported by affidavit. But in a very recent case of *Lamb v. Orton* (1 Drew. 41), the contrary, and that since the 15 & 16 Vict. c. 86, appears to have been ruled.

A very frequent ground of objection to production of documents is, that they are privileged as confidential communications.

This rule is at least well settled, that any documents in the possession of a defendant, being actual or intended communications between him and his legal advisers in relation to the matters affected by the suit, and whether communicated or intended to be communicated direct to the legal advisers of the defendant, or through third persons acting as the agents in the matter, are privileged documents which he is not obliged to produce, though he admits their possession, and that they relate to the matters in the bill: (*Reid v. Langlois*, 1 Macn. & Gord. 627; *Greenough v. Gaskell*, 1 Myl. & K. 98.) It is also well established, that if the defendant has in his possession documents relating to the matters in the bill, being confidential communications between him as solicitor of a party, and that party, for the purpose of legal advice those documents are privileged, whether the communications were in the matters of the suit, or before it in respect of the suit, or quite irrespective of and unconnected with the suit. If they are confidential communications between him, in his character of solicitor, and his client, they are privileged against production. But, though a solicitor is thus privileged in right of his client against divulging any confidential communications, the privilege of the client, when the motion is against him personally, seems not to go so far, but only to extend to communications made in or in reference to the particular suit: (see *Greenlaw v. King*, 1 Beav. 137.) The order is in *Gurland v. Scott* (3 Sim. 396); *Greenough v. Gaskell* (1 Myl. & K. 98), and the authorities there referred to.

In a very recent case (*Thompson v. Falk*, 1 Drew. 24), Vice Chancellor Kindersley thus observed upon the distinction "If I could upon authority determine the abstract poin;

which has been argued, viz. whether the privilege of the client is as extensive as that of the solicitor, I should be glad to remove the anomaly by which it seems that, when the solicitor is interrogated, and objects because it would be calling on him to divulge matters which passed in the relation of solicitor and client, then there is privilege, without more, whether such matters relate to an actual or contemplated litigation or not ; and yet, if the same questions are put to the client, then when his privilege is in question, he is to be told that he has a less privilege than he would have through his solicitor if the latter were questioned ; so great an anomaly, so inconsistent and absurd a rule, I should be glad to take on myself to say is not the rule of this court ; and that there is no such distinction." From this language it may be collected that, probably at this day, if the precise point were to come before the court, it would extend the privilege of the client in person, so far as relates to answering through his solicitor ; however, in practice the point must still be treated as at least doubtful.

The brief, on a motion for production on the admissions contained in the answer, will consist of a copy of the bill ; of the notice of motion ; and of the answer or answers on which the motion is made.

In strictness, as above pointed out, the order made on a motion to produce documents is, that they may be left with the Clerk of Records and Writs ; but when the defendant satisfies the court that, for any sufficient reason, as, for instance, that the documents are in daily use (as a banker's or merchant's ledgers) such transfer of the documents from his possession would be very inconvenient, it will, in general, order inspection at the office or counting-house, or on the premises of the defendant. When production is ordered of documents containing matters relating to the plaintiff's case and title, and also other matters relating exclusively to the business of the defendant, or of other persons in respect of matters not concerning the bill, the defendant is permitted to seal up all such parts as he swears, either by his answer or by an affidavit filed in support of his answer, do not relate to the matters in the cause. It is not very usual to anticipate this point in the answer, but it is in general reserved to the hearing of any motion, and then an affidavit is filed on producing the documents, and against such affidavit no evidence will prevail. Thus, in the *Sheffield Canal Company v. Sheffield and Rotherham Railway Company* (1 Phil. 484), the defendants admitted the possession of a particular book, and the plaintiffs obtained an order for its

production, but liberty was given to the defendants to seal up, on the oath of their law clerk, such parts as did not relate to the matter in question, and the book so sealed was produced; afterwards, a motion was made for producing the book unsealed, founded on an affidavit that a resolution (relating to the matter in issue) had been passed; and "that the page of the book in which the resolution would have been found, if it had been entered at all, was one of those which were sealed up;" the defendants filed no affidavit in reply, but stood upon the practice as laid down in *Purcell v. Macnamara* (Wigr. on Disc. 240); *Bower v. Fernie* (3 Myl. & Cr. 632), and the Lord Chancellor refused the motion.

Before the 15 & 16 Vict. c. 86, in general a defendant could not obtain from a plaintiff production of documents, except by filing a cross bill; there were some few exceptions, which it is unnecessary now to consider, because, by the 20th section of the act, the court, upon the application of any defendant in any suit, whether commenced by bill or by claim (but as to suits commenced by bill where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer to the bill, unless the court shall make any order to the contrary) may make an order for the production by the plaintiff in such suit on oath of "such of the documents in his possession or power relating to the matters in question in the suit, as the court thinks right; and the court may deal with such documents, when produced, in such manner as shall appear just." The language of this clause of the act is, it will be observed, precisely the same as that of the 18th clause relating to production by defendants; whence it is to be inferred that the plaintiff is under the same liabilities as to the production, and will have the same rights in regard to any ground of objection to production, as a defendant would have. The practice is for the plaintiff to be put to file an affidavit as to all the documents in his possession or power, of the same kind as that which has to be filed by a defendant; and the same course is pursued on a summons in chambers by a defendant against a plaintiff to produce, as on a summons by a plaintiff against a defendant; (see the form of affidavits, *ante*, p. 32.) A defendant cannot, however, obtain production by a co-defendant without a cross bill (*Attorney-General v. Clapham*, 10 Hare, App. 68), but this is not very material, because a defendant may examine a co-defendant as a witness, and in such examination may of course obtain the production of any documentary evidence, not privileged, that the witness possesses, material to

his evidence; and may read such documentary evidence against the plaintiff.

The common order for inspection is for the plaintiff, *his solicitor and agents*, to be permitted to inspect; this does not authorize the plaintiff to employ, or to bring with him *a co-defendant* to inspect: (*Bartley v. Bartley*, 1 Drew. 233.) As to delivery out of documents, see *ante*, p. 31.

Of motions for the appointment of a Receiver.

A Receiver is an officer of the court appointed *pro hac vice*, in cases in which the rights of parties to property real or personal are in dispute, and in the mean time, the rents, issues, and profits of the property are in danger either of being improperly received and applied, or of not being received at all, to the detriment of the party who shall ultimately be determined to be the right owner.

A receiver can only be appointed in a suit commenced, except in the case of lunatics, in which the Lord Chancellor will appoint a receiver on petition in the lunacy (*Ex parte Radcliffe*, 1 Jac. & W. 639; *Ex parte Warren*, 10 Ves. 622), and formerly, a receiver was very rarely appointed before answer, and could in general only be moved for on the admissions contained in the answer. There were certain cases of exception which it is now immaterial to consider, by reason of the 59th clause of the 15 & 16 Vict. c. 86, which makes the answer for the purpose of evidence on a motion for or to discharge a receiver, only on affidavit, which may be rebutted by affidavit on the part of the respondent. Consequently, now, a motion for a receiver, like a motion for an injunction, may be made at any time after bill filed, on affidavits. The 6th section of the act only applies to injunction bills, or bills praying a *ne exeat*, or for making an infant a ward of the court. Therefore, a bill praying a receiver, or on which it is intended to found an application for a receiver, must be a printed bill. A motion for a receiver must be on notice, and on the usual two clear days of notice.

In general, a receiver will not be appointed against the party in possession under the legal estate, unless he holds such legal estate in a fiduciary character, and the case made against him is of fraud, or of conduct being a breach of trust, or in the nature of a breach of trust. Thus, a receiver will not be appointed so as to interfere with the possession of a legal mortgagee in possession, though, if he is not in possession, a receiver may be appointed as between subsequent equitable

incumbrancers, without prejudice to the right of the legal mortgagee to take possession; and if he thinks fit he may take possession, but, except by taking possession, he cannot object to the appointment of the receiver: (*Silver v. Bishop of Norwich*, 3 Swanst. 112.)

But this rule only applies to the case of a clear prior legal owner, not to the case of a contest between the plaintiff claiming the legal estate, and the defendant holding it; in this latter case, then, the court will appoint a receiver, if it sees ground for fairly anticipating that the plaintiff may turn out to be entitled, and if a case of danger is made: (*Metcalfe v. Pulvertoft*, 1 Ves. & B. 180.)

In the case of trustees or executors, the court will appoint a receiver against them, upon a sufficient case made of danger arising from misconduct, or actual bankruptcy or insolvency, but not upon mere implied danger anticipated from poor circumstances: (*Hathornthwaite v. Russell*, 2 Atk. 126; *Howard v. Papera*, 1 Mad. 142; and see *Gladdon v. Honeman*, *ibid.* p. 143, notes.)

So, a receiver will be appointed in suits for terminating and winding-up partnerships, or for winding-up partnership accounts after termination; upon a sufficient case of misconduct either producing or tending to produce danger to the partnership assets, by the party in possession remaining in possession; or by either party being in possession. But in all cases, and in partnership cases more especially, the appointment of a receiver is a matter for the discretion of the court, and the court will, in partnership cases, look anxiously to see whether a receiver would or would not damage the carrying on of the concern: the object of a receiver being always the preservation of the property in its integrity.

A motion for a receiver must be made in the first instance to the court. But whenever a receiver has been appointed, and the office has become vacant, a motion for the appointment of a new receiver is made upon summons in chambers: (*Grote v. Bing*, 9 Hare, App. 50.)

The motion must be supported by affidavits verifying all those material facts on which the equity for it is founded, and is in that and other respects conducted in the same manner as a motion for a special injunction (see *ante*, p. 54, *et seq.*)

XIV. *Of the Defendant's proceedings to the hearing of a cause.*

I proceed now to discuss the general proceedings of defendants, assuming that the cause goes on in the regular course.

When the defendant's solicitor has been served with a copy of the printed bill, his first step in the cause is to enter an appearance. This he does by attending at the Writ and Record Clerk's Office, and there leaving with the clerk in whose division the cause is entered, a paper signed by him in the following form :—

A.)	Enter an appearance for the defendant () at the suit
v.)	of A. Dated the day of 185 . C. D.
B.)	No. (address.) Defendant's solicitor.

Before appearance, no notice of motion can be served on a defendant without special leave of the court obtained for that purpose. After appearance has been entered, generally, all services on the part of the plaintiff are regularly made on the defendant's solicitors. There are a few exceptional cases in which service must be personal; they will be noticed in the separate chapter on service. The defendant is entitled to require from the plaintiff's solicitor ten printed copies of the bill, paying therefor at the rate of one half-penny per folio. Appearance having been entered, and the defendant's solicitor having procured from his client information as to what, if any, defence he can make to the case made by the bill, he will proceed accordingly. If the defendant has a *bonâ fide*, and apparently conclusive, answer to make to the bill, it is sometimes prudent, particularly if the defence is founded on documents or other incontrovertible evidence, at once to communicate with the plaintiff's solicitor and inform him of the nature of the defence, with a view to give the plaintiff the opportunity of terminating at once the litigation, by dismissing his bill. But assuming, as usually is the fact, that the case is not altogether clear on either side, then the defendant's solicitor should proceed to put into a connected form a written statement of his client's case; and this, accompanied by copies or a full statement of the contents of such material documents as his client possesses or can have access to, he should lay before his counsel, as instructions to advise what course should be pursued in defending, viz. whether it should be by demurrer, by plea, or by answer. It will be recollected that, if the plaintiff does not file interrogatories, the defendant is not bound to put in an answer (see *ante*, p. 10); but he may always put in a voluntary answer at any time within twelve

days after his appearance ; and frequently it may be advisable to defend by answer, though the plaintiff may not have required it.

XV. *Of defence by Demurrer.*

If a defence by demurrer is advised, the solicitor instructs counsel to prepare such demurrer as he advises ; and when he has obtained the draft demurrer, he has a copy made on parchment which he indorses (17th Order 1852); and takes such copy to the office of the Clerks of Records and Writs, where he procures it to be filed by leaving the copy with the clerk in whose division the cause is. Having filed the demurrer, he must on the same day and before eight o'clock in the evening (22nd & 23rd Orders of October, 1852) give notice of his having done so to the plaintiff's solicitor.

The defendant has twelve days from the date of his appearance to demur, if he demurs to the whole bill, and fourteen days from the date of the delivery of the interrogatories, if he demurs to part only, for pleading or answering to the whole, or to the residue. If the plaintiff does not set down the demurrer within (twelve) days from the date of its being filed, the demurrer is taken to be allowed as if it had been heard in court and allowed on argument. The bill is then out of court, and the defendant is entitled to his costs of the suit if the demurrer is to the whole bill, and of the demurrer, if it is to part of the bill only, and these costs may be at once recovered on an *ex parte* application, by motion handed in to the registrar : (*Jacobs v. Hooper.*) If the demurrer is submitted to without being set down, the plaintiff has, as before mentioned (page 12), a right as of course to amend his bill on paying 20s. costs. If the plaintiff does not set down the demurrer, the defendant may do so, and the proceedings which he must take for setting it down are the same as those already pointed out for setting down a demurrer by the plaintiff: (see p. 13.) If the demurrer is set down by the plaintiff, the defendant's solicitor, on receiving service of the order setting it down, should proceed at once to prepare and deliver his brief. The brief for the defendant, like the brief for plaintiff, will consist of a copy of the bill, and of the demurrer, and of one or two sheets of observations, if the solicitor chooses to prepare any. On attending the court when the demurrer comes on for argument, the defendant's solicitor should be furnished with an affidavit of the service on him of the order setting down the demurrer, as, in

case the plaintiff does not instruct counsel to appear, the defendant's solicitor will, on production of such affidavit, be entitled to have the demurrer allowed with costs; but if he is not prepared to produce the affidavit of service, the demurrer will be simply struck out of the paper, and may be restored on the application of either party.

On the argument of a demurrer, the defendant is not confined to the grounds set forth in the written demurrer; but may demur at the bar, as it is termed, *ore tenus*, on other grounds, but that must be understood with this limitation: the demurrer *ore tenus* must be to the matter to which the demurrer on the record addresses itself, though it may be on grounds of argument not appearing thereon. Thus a demurrer on the record for want of parties only would not support a demurrer at the bar, for want of equity generally; nor would a demurrer for want of equity generally to a bill for discovery and examination of witnesses for recording their testimony support a demurrer *ore tenus* to the examination of witnesses: (*Pitt v. Short*, 17 Ves. 213.)

If the demurrer is allowed on argument, it is, unless the court make other order, allowed with the costs of the demurrer, if it is only to a part of the bill, and with costs of suit, if the demurrer is to the whole bill: (45th Order, 1845, and see Sect. III.) When the demurrer is allowed, but with leave to the plaintiff to amend, the court may give special directions about costs, but usually the demurrer, if allowed at all, is with costs of the demurrer: (see on this part of the proceedings, *ante*, p. 15.) The defendant has then nothing more to do till the plaintiff has amended his bill, and served him with a printed copy of the amended bill. The plaintiff must, however, amend within the time limited by the order giving him leave; if he does not, the defendant may move to dismiss the bill for want of prosecution. For this purpose he procures a certificate from the office of the Clerk of Record and Writs, of the date of the filing of the bill; and from the Registrar's Office, an office copy of the order made on the hearing of the demurrer. These documents form the materials on which he instructs counsel to move that the bill may be dismissed for want of prosecution. This motion must be on notice, and must be moved in or out of term on one of the days called seal days, which are fixed at the beginning of each sitting by the court. The defence to such a motion is usually some explanation supported by affidavits explaining the delay; it is not, in general, very material to answer such affidavits, as the court is at this stage of the cause so extremely reluctant to do more than

put the plaintiff on peremptory terms to proceed, that it is scarcely possible such merits can be shown as will obtain an actual dismissal of the bill; the terms of giving time to the plaintiff are, almost invariably, that he pay the defendant's costs of the motion, and that he take the step which he has neglected within some given time; sometimes an additional term is, that if that step is not taken at the time fixed, the bill shall stand dismissed with costs, as of the date of the motion to dismiss; but, more usually, the motion is ordered to stand over, to be renewed if, at the period fixed, the plaintiff has not taken the prescribed step.

The defendant is entitled to give notice of motion to dismiss immediately, on the expiration of the time allowed for amending, and having given the notice, he is entitled to prepare forthwith and deliver a brief to counsel, and the costs of preparing such brief must be paid by the plaintiff, as the defendant is entitled to make the motion, if he has regularly given notice. It is, however, usual for the solicitor of the defendant to give a preliminary notice by letter to the plaintiff's solicitor, informing him that he intends to move to dismiss, if the amendments are not filed by a given day.

XVI. *Of defence by Plea.*

When the defendant is advised to plead to the bill, the grounds of the plea are usually stated or referred to by counsel in his Opinion; and the defendant's solicitor will then lay before his counsel instructions to prepare the plea, accompanying such instructions by copies of the documents, or information on the particular points on which the plea is to be based. A plea must be filed within fourteen days after service of the copy of the interrogatories, when an answer is required, and within twelve days from appearance, if no answer is required and the plea is voluntary. Pleas are invariably drawn and *must* be *signed* by counsel. When the plea is drawn, the solicitor makes a copy of it on parchment, and files it in the same way as a demurrer; and must give notice on the same day to the solicitors of the plaintiff of his having filed a plea. Some pleas require to be sworn, and that must be done in the same manner as already pointed out in respect to affidavits (see p. 38), and must be signed by the defendant. Those pleas which do not require to be on oath need not be signed by the defendant. The distinction when a plea must be, and when it needs not be, on oath, is this: when the plea is of matter of record, or of some matter

requiring no proof but that which is before the court and proves itself, as a plea of a former suit, or of the plaintiff's conviction for felony, of which therecord is proof, the plea needs not be on oath. When the plea is wholly of matter of fact, or of statutes, the operation of which in bar of the plaintiff's right requires the addition of matters of fact, as a plea of a released and settled account, which must be supported by an averment of no fraud, or of the Statute of Frauds, which requires an averment by the defendant denying the part performance alleged by the plaintiff; then the plea must be on oath. When the plea has been filed, either party may set it down immediately (44th Order, 1845); but if the defendant does not set it down, and the plaintiff does not set it down within three weeks from the date of the filing of the plea, he will be held to have submitted to it. The mode of setting down a plea is the same as that for setting down a demurrer (see *ante*, p. 17), and so is the mode of disposing of it on argument in court: (see also, p. 17.) If the court allows the plea, it may do so wholly and without giving liberty to the plaintiff to amend his bill as in the case of a demurrer; or it may allow the plea, with liberty to the plaintiff to amend. In either case the costs are in the discretion of the court, but usually, if a plea is allowed, it is with costs. If the court overrules the plea, it is almost invariably with costs; and then a certain time in the discretion of the court is allowed to the defendant to put in his answer. It is obvious that demurring and pleading may thus be used for other purposes besides a substantial defence to the bill; as, unless the demurrer or plea is plainly frivolous, time is always given for answering; and thus the defendant may gain time, if he chooses to do so at the risk of paying the costs of the demurrer or plea. In heavy cases, such as bills by contractors against companies, where the mere postponement of an account and of the payment of very large sums of money may be of great importance, it occurs sometimes that defendants demur or plead, although they may be advised, or may reasonably expect that the demurrer or plea will be overruled: such a course is, however, manifestly an abuse of the proeedure of the court, and deserves reprobation rather than imitation.

The effect of a plea to the whole bill being allowed, without liberty to amend, is to put the bill out of court, and the order allowing the plea also orders the bill to be dismissed: (48th Order, May, 1845.)

The other material points relating to the practice on pleas are discussed *ante*, in Section IV., p. 16, *et seq.*

XVII. *Of defence by Answer.*

If having demurred, or pleaded, or both, the defendant is unsuccessful, he must proceed to put in an answer, which he must then file by the period fixed on the overruling of the demurrer or plea.

The time within which a defendant must file his answer, if he defends by answer without either demurring or pleading, is fourteen days from the service of the copy of the interrogatories. If in either case, the defendant requires further time to answer, he applies for it to the judge's chief clerk in chambers, by taking out a summons, of which he must give two clear days' notice to the plaintiff's solicitor. The application for time to answer must be supported by an affidavit shewing, why the defendant cannot put in an answer within the time limited.

The preparation of instructions for an answer requires great care and skill. The defendant's solicitor should first prepare a brief copy of the bill, and a copy of the interrogatories copied in half margin, which he should lay before his client, with instructions for him to write, opposite to each interrogatory, the answer that he is able to give to it. The solicitor should then himself carefully peruse the client's answers, and afterwards, in one or more personal conferences, go through them carefully with his client; calling his particular attention to any answers which may appear to him to require explanation or addition, and in particular, to any which may appear to him, however advantageous they may be to the defendant, to bear the impress of inaccuracy or exaggeration; for, generally speaking, an answer once filed is final, and will not be allowed to be afterwards *contradicted* by the defendant on any material point, and in practice it is found that defendants are frequently injured by their own overstatement of their case, quite as much as by the evidence of the plaintiff.

Although, in general, an answer is final, there are instances in which it will be allowed to be corrected by a supplemental answer. Thus, in a case where a defendant, answering as to matters taking place in India, set up the Indian Insolvent Debtors Act, by way of defence, and stated dates which did not bring him within it, he was permitted to file a supplemental answer to correct that statement of dates by the substitution of dates which did bring him within it: (*Fulton v. Gilmore*, 1 Phil. 522.) So, in a case where the original answer misstated facts as to the custom of a manor, the defendant was permitted by

supplemental answer to correct it: (*Frankland v. Overend*, 9 Sim. 365.) But this liberty is given with extreme reluctance and difficulty if the effect of the correction is to damnify the plaintiff; and it can only be obtained by a special application, which is made to the court by motion or notice. The notice of motion must specify the alterations proposed to be made, and must be supported by affidavits verifying the new statements, and satisfactorily explaining the grounds of the mistake, and the reasons why the new statement was not introduced in the original answer.

When the defendant's solicitor has obtained from his client his own version of his defence, he lays it before his counsel, together with such documentary information as he possesses, as instructions to prepare a draft answer. As an answer, like every other pleading, strictly so called, must be *signed* by counsel, it is in fact always drawn by counsel; the draft so prepared and signed is copied on parchment, and the name of the counsel transcribed on the copy. The answer, thus engrossed, is endorsed by the defendant's solicitor with his name and address, and is signed and sworn by the defendant in the same manner as an affidavit. The answer, duly sworn, is filed at the office of the Clerk of Records and Writs, and the defendant's solicitor must give notice the same day to the plaintiff's solicitor, before eight o'clock of the evening: (22nd Order, October, 1842.)

Some answers are not sworn. Thus a peer of the realm puts in his answer on his protestation of honour, not on oath: (Beam. Orders, 105.) And a bishop upon his honour; and a corporate body answers under the common seal of the corporation.

An infant is incapable of binding himself positively by answer, and puts in his answer by his guardian, who signs and swears it. Mr. S. Smith in his recent valuable work, (*Practice of the Court of Chancery*, 1855, p. 168), suggests that the usual infant's answer, amounting to no more than stating that he is an infant, and claiming such rights as he is entitled to, will now no longer be necessary. But this, I apprehend, is not so; for although the usual infant's answer is, for all substantial purposes, utterly useless, yet in point of form, I conceive that it is still the practice that, if interrogatories are filed, and an infant defendant is required to answer, the cause could not regularly be set down for hearing, unless he had answered. Of course, if an infant defendant is not required to answer, replication may be regularly filed under the new practice, whenever the plaintiff is in a position to do so against the answering

defendants; and the cause will be thus regularly at issue (see *ante*, Sect. IX., p. 34, *et seq.*), and of course also, as it is wholly useless to address interrogatories to an infant defendant, the point becomes in fact of little importance, as it is probable that the practice of requiring any answer from an infant will fall entirely into disuse. The solicitor of an infant defendant should not, however, treat it as altogether unimportant whether his client answers or not; but should lay the bill and the matters which he may have to offer in defence before his counsel, as the new practice does not in the slightest degree remove the propriety of an infant in some cases putting in a voluntary answer, in order to suggest facts, the proof of which may be material to his interests.

A lunatic, so found by inquisition, answers by his committee; if not found lunatic by inquisition, but being of imbecile or unsound mind, the court will assign him a guardian *ad litem*, and he puts in his answer by such guardian.

As to defendants in Scotland, Ireland, or the Channel Islands, or in any colony, island, plantation, or place, under the dominion of the Queen, or in any foreign parts out of Her Majesty's dominions, that is provided for by the 22nd section of the 15 & 16 Vict. c. 86 (see *ante*, p. 39), and the answer of any such defendant may be sworn in the same manner as is there pointed out in reference to affidavits. An answer taken in the country, or out of the jurisdiction, may be transmitted to London to be filed in the same way as an affidavit: (15 & 16 Vict. c. 86, s. 25.)

The answer of a married woman, if she answers with her husband, is the husband's answer, but they both sign and swear it; but if her interests require a separate answer, or if the husband and wife live separate, the wife may obtain an order of course to answer separately; and then she signs and swears to her own answer.

Sometimes a defendant defends partly by answer and partly by disclaimer, or wholly by disclaimer; that is, by an averment that he has not, and had not at the institution of the suit, any claim, or had before the institution of the suit distinctly intimated his readiness to give up and release, and was able to release, all his interest, if any.

A disclaimer is, in point of form, an answer, and must be signed by counsel and engrossed, and signed and sworn by the disclaiming defendant and filed, like an answer. If the defendant by his disclaimer avers that he had not at the institution of the suit any interest; or, having an interest,

that he had offered before the institution of the suit to disclaim and release it, and also by his disclaimer avers that he claims no interest, he is entitled to be dismissed with his costs. But if he disclaims for the first time by his answer; or if, although he offered to disclaim before the suit, it is shown that he could not effectually bar his interest, he may or may not be entitled to be dismissed, but, if dismissed, is not entitled to costs.

Of exceptions to answers.

When the answer has been duly filed, the defendant's solicitor will proceed to take an office copy of it. If the plaintiff excepts to the answer for insufficiency, on receiving notice of the filing of the exceptions, the defendant's solicitor obtains from the office of the Clerk of Records and Writs an office copy of the exceptions, and lays a copy of them before his counsel, to advise whether they should be submitted to and a further answer put in, or whether they should be resisted. It is a very common course of practice, at this stage of the proceedings, to lay the bill and answer before counsel, to advise not only on the sufficiency of the answer but on the necessity of going into evidence, and, as it is phrased, *to advise on the suit generally*. Such a course is not, however, to be recommended to the prudent practitioner, as it is manifestly premature to take the opinion of counsel on the necessity of going into evidence on the admissions of an answer, which, if held insufficient, may lead to a further answer entirely changing the state of things. The proper course is, at any rate on behalf of the defendant, at this stage of the suit, to require counsel to advise only on the sufficiency of the answer.

What is the regular course of proceeding on exceptions on the part of the plaintiff, has been stated *ante*, (Sect. VI., p. 25, *et seq.*)

If counsel for the defendant advises that the exception cannot be resisted, the defendant has eight days from the filing of the exceptions to submit to them: (9th Order, 2nd November, 1850.) This he does by handing a note to that effect to the plaintiff's solicitor, and paying 20s. costs. He must then put in a further and better answer, within three weeks from the date of his submission (10th Order, November, 1850), for which purpose he instructs counsel to prepare the further answer in the same manner as in giving instructions for the original answer, except that he furnishes him with such information as the defendant has, whether

intentionally or inadvertently, withheld in giving instructions for the original answer.

The further answer is engrossed, signed, sworn, and filed, in the same manner as an original answer. If the defendant's counsel advises resistance to the exceptions, no notice to the plaintiff's solicitor is requisite, and the exceptions will be set down by the plaintiff for hearing in the manner pointed out in p. 26; and if they are not set down as there stated, after the expiration of the eight days allowed to the defendant to submit, and within fourteen days from their being filed, the answer will be deemed sufficient. On receiving notice of the exceptions being set down, and not before, the defendant's solicitor should prepare, and as early as possible deliver, his briefs to counsel, as to which the observations made *ante* (pp. 26, 27), in reference to the brief on behalf of the plaintiff, apply. The course of disposing of the hearing of exceptions, and the mode of dealing with the costs upon allowing or overruling them, and the duties and liabilities of a defendant in respect of his several further answers, if successive sets of exceptions are taken, have been discussed *ante* (Sect. VI., pp. 27, 28, *et seq.*) and require no further notice here.

Of the defendant's proceedings on going into evidence.

When the answer or answers have been finally either found sufficient or treated as sufficient by the plaintiff, and the plaintiff has filed replication, each defendant against whom replication is filed will then proceed to prepare his evidence; for which purpose the solicitor will lay the bill and the answer, and copies of the documents, on which he intends to rely, before his counsel, to advise on what points evidence must be gone into in support of the answer.

The subject of evidence has been already partially discussed *ante* (Sect. X., p. 36, *et seq.*); and what is there said on its preparation, for the examination of witnesses on the nature of the evidence now used, and on the mode of examination, applies generally to defendants as well as to plaintiffs. But there are some matters peculiar to defence, which require to be here noticed.

The defendant cannot, in point of form, use his own answer, although on oath, when the plaintiff has replied, as evidence for himself against the plaintiff, except on the question of costs; or for the purpose of raising a case for further inquiry in chambers. But he may, by converting the whole or part of his answer into an affidavit, make it

evidence; that is, he may make himself a witness, and prove by affidavit whatever he has sworn by his answer; but he will then of course be liable to cross-examination. If the plaintiff has not replied, but sets the cause down upon bill and answer, then every averment of the answer may be read by the defendant as evidence for himself, or perhaps, to speak more accurately, as the plaintiff produces no evidence except the answer, he must stand or fall by that. The subject of applications to enlarge the time for closing evidence has been discussed *ante* (p. 47.) It may here, however, be noticed, that if a plaintiff seeks to enlarge the time, he serves all the defendants entitled to examine witnesses with the summons. If a defendant seeks to enlarge the time, he serves all *his co-defendants*, entitled to examine witnesses, as well as the plaintiff; and when the time is enlarged at the instance of *any* party, *all the other parties* entitled to go into evidence may profit by the enlargement further to examine witnesses. The rule is that, until the evidence is closed, the court will not preclude any party from producing evidence: (*Wood v. Scarth*, 3 Week. Rep. 305.)

The plaintiff may read any portion of a defendant's answer as evidence *for himself* against that defendant, but not against *any other defendant*, unless previous notice is given to such other defendant of the intention to read his answer as evidence: (*Cousins v. Vasey*, 9 Hare, App. 61.) This arises out of the rule that, in general, the answer of one defendant is no evidence against a co-defendant.

It is very difficult to conceive on what principle *notice* to one defendant of an intention to read another defendant's answer against him can let in that answer *as evidence*. The principle on which the answer of a defendant is read against *him* is intelligible and clear; it is not that it is strictly *evidence*, that is, the deposition of a witness, but that it is an *admission by the defendant*. But a defendant answering was not, under the old practice, nor is he under the new, simply by and through his *answer* a *witness*; and therefore though obvious that practically to give to defendant A. notice of an intention to read against him the answer of defendant B., will enable him to bring forward evidence *contra*; and so may remove the practical inconvenience alluded to in *Cousins v. Vasey*, yet it is not clear how in strictness and upon principle any notice can make *evidence* against A. an answer of B. which is not made of itself by the statute (the 15 & 16 Vict. c. 86), anything more than it was before; viz., the *admission of B.* usable against himself as an *admission*, and not in the strict character of the

evidence of a witness; the point is only stated in *Cousins v. Vasey* by way of dictum, and it may be thought still very unsafe to rely on the doctrine, that with notice even, the plaintiff may read the answer of one defendant against another. As the clear admission of the defendant is evidence for the plaintiff, it follows that the plaintiff cannot go into evidence to prove that which is admitted by the answer, except at the risk of paying the costs of such superfluous evidence; and against a positive statement by the answer, the bill cannot be sustained on the evidence of a single witness, unsupported by any corroborative evidence. But slight corroborative evidence may turn the scale.

When a defendant's answer is read as evidence against himself, he is entitled to require not only that the whole of any particular passage selected, but that any other passage substantially relating to and connected with the passage so tendered, shall be also read; that is, the plaintiff may not read as evidence part of a passage telling for him, and omit another part of it qualifying the first; nor may he read one passage for him without also reading any other which, whatever may be its locality in the answer, fairly and substantially relates to and qualifies the passage tendered: (see *Bartlett v. Gillard*, 3 Russ. 149; *Rude v. Whitchurch*, 3 Sim. 562; *Nurse v. Burm*, 5 Sim. 225.) This rule is dealt with as one of substance, not of form; therefore, if the plaintiff reads from the answer a passage, the defendant cannot read a passage, even immediately following, merely because it is connected with the passage read by some expletive word, as "but" or "for" unless the passage so introduced relates substantially and materially to the preceding passage; while, on the other hand, he may insist on reading a passage from any part of the answer, whether it is or is not connected with the passage tendered by any expletive word, if it substantially relates to it: (*Davis v. Spurling*, 1 Russ. & Myl. 64.)

XVIII. *Of evidence generally.*

Before the new practice, evidence being by interrogatories the conduct of it was so much out of the hands of the solicitor, and confided by him to counsel, that a knowledge of the general subject of evidence was not so material to the solicitor as it has become since. But now that a large portion of the evidence in Chancery is taken orally, and so much depends on the solicitor in collecting evidence and preparing depositions by way of instructions for examination,

it will be convenient that, before proceeding to treat of the hearing of a cause, I should discuss somewhat more the general rules of evidence, and the nature of the evidence that is in practice required in Chancery suits.

And firstly it may be observed that, generally, the same rules prevail in equity as at law, as to *what is evidence*; though of course the peculiarities still incident to equitable procedure may sometimes modify the operation of the rules.

The evidence used in a Chancery suit consists of—

1. The admissions of the parties.
2. Documentary evidence.
3. The evidence of witnesses.

The admissions of parties are of two kinds—the admissions contained in the pleadings, and the admissions made by agreement.

The admissions contained in the pleadings are, as against the plaintiff, the allegations of the bill; as against the defendant, the admissions made by the answer.

Whatever is alleged by the plaintiff in the bill *positively*, by way of *averment*, is evidence against him; thus, if he avers that he did a certain act, not only the defendant may read that averment as proof of the fact in his own favour, but the plaintiff cannot go into evidence to show that he did not do it. But what the bill alleges, not by way of positive averment, but only by way of inference or hypothetically, is not evidence against the defendant.

It has already been observed that, whatever the answer avers may be read by the plaintiff against the defendant as an admission of the facts averred. And the extent to which, and the qualifications with which, the averments of the answer must be read, have also been discussed. It is needless to say that a carefully drawn bill will scarcely ever be found to aver positively any facts or matters beyond those which are the plaintiff's own case.

Admissions by agreement.

Admissions are frequently, to save expense, entered into on both sides in writing, or they may be made by one side only; reciprocity or consideration not being essential. The proper mode of making admissions is for the solicitors of the parties to sign an agreement to the effect of the intended admissions. Thus: “We the undersigned solicitors for the plaintiff and defendant in this cause, agree to admit at the hearing thereof, or otherwise as may be necessary, that the several deeds mentioned and referred to in the schedule hereto

were respectively duly executed by the persons whose names are signed thereto as executing parties; and that the several letters mentioned and referred to were respectively signed by the persons whose signatures they bear respectively, and were respectively sent to and received by the persons to whom they were addressed respectively; and that the same shall be respectively read at the hearing of, or otherwise, in this cause as either party may be advised, in the same manner as if the same had been regularly proved; and that we will produce and permit to be read at the hearing of and otherwise in this cause such of the original letters respectively as are admitted in the said schedule to be in our respective possession.

“A. B. Plaintiff’s solicitor.

“C. D. Defendant’s solicitor.”

Great care should be taken in framing admissions, so as not to make them go beyond the intention; though in general they will be strictly construed. Thus, an agreement to admit deeds or letters as *executed or written*, leaves it quite open to show that they are *badly pleaded or essentially defective*: (*Goldie v. Shuttleworth*, 1 Camp. 70.) So in *Mounsey v. Burnham* (1 Hare, 15), where the solicitors of the parties agreed to admit as fact that the defendant was served with a certain notice, and that a certain paper writing was the notice, and that another paper writing was a true copy of the lease referred to in the notice. The original lease was not produced, and there was no evidence of its existence except the copy produced as a true copy and the notice which informed the defendant of the execution by the plaintiff of the lease. The court held that the admission merely substituted the copy of the lease for the original, but did not place it in a better position than the original would have been in if produced; and that the admission of the notice did not dispense with proof of the lease by calling the attesting witness.

The practice of admissions, as they avoid expense, is favourably looked at by the court; but they will be confined to the cases where the rights of the parties only are affected by them, and the parties are persons competent to waive their own rights. Thus, an infant cannot make admissions. Nor will any agreement in the nature of admissions be permitted to defeat the provisions of the law. So that no admission of an unstamped document that ought to be stamped will be permitted; nor would formerly any consent to the examination of a wife for her husband be permitted:

(see *Barker v. Dixie*, Rep. temp. Hardw. 264; *Owen v. Thomas*, 3 Myl. & K. 357.)

On the practice of entering into admissions generally, I may observe in conclusion, that much danger arises from an indiscriminate resort to it. The object and almost the only object of it in a contested suit is to save expense; and in general it should therefore be strictly confined by the practitioner to those cases in which he is satisfied that his opponent has the means of proof, and that the only result of putting him to proof will be to cause unnecessary expense. But wherever he has any reason to believe or anticipate that, if put to proof, the opponent may wholly or partially fail in the particular proof, he should abstain from entering into any admission.

Of competency and incompetency of witnesses.

Before discussing the details of evidence, it will be convenient to dispose of the question, who may be witnesses? that is, what classes of persons are, and what are not, incompetent to give evidence.

This inquiry is much more limited now than it used to be formerly, by reason of the several acts that have passed of late years, removing various grounds of incompetency.

The principal grounds of incompetency were formerly, personal incompetency, arising from idiocy, lunacy, infancy, absence of religious belief, and infamy; to these may be added, the ground of marriage, which applied only as between husband and wife; and interest in the subject-matter of the litigation, whether by being parties; or not being parties by having an interest *aliunde*; these grounds of incompetency have been affected by several statutes.

The 6 & 7 Vict. c. 85, commonly called Lord Denman's Act, provided that "no person offered as a witness shall hereafter be excluded, by reason of incapacity from *crime or interest*, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court or before any judge, jury, sheriff, coroner, magistrate, or person having by law, or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question,

or in the event of the trial of any issue, matter, question or inquiry, or of the suit, action, or proceeding in which he is offered as a witness; and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence." This was followed by a proviso excepting from the new competency parties individually named on the record, and affecting actions of ejectment and replevin; and then it was provided that, "in Courts of Equity any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff, or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matter or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness."

This act was followed by the 14 & 15 Vict. c. 99, which first repealed the first proviso of the previous statute affecting parties to the record, and ejectment and replevin, and then provided "that on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, *the parties thereto*, and the persons on whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the suit, action, or other proceeding."

The first exception was that, in criminal proceedings no person was to be competent or compellable to give evidence for or against himself; and that in civil proceedings, husband and wife should not be competent or compellable to give evidence for or against each other.

Under the last of these statutes, a question arose in a suit in equity, whether a wife party to the suit was competent or compellable to give evidence against her husband; and it was held that she was not: (*Alcock v. Alcock*, 16 Jur. 653.) But that statute was followed by the 17 & 18 Vict. c. 83, which enacts that, "on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, or before any person having by law or by consent of parties, authority

to hear, receive, and examine evidence, *the husbands and wives of the parties thereto*, and of the persons on whose behalf any such suit, action, or other proceeding, may be brought or instituted, or opposed, or defended, shall, except as hereinafter excepted, be competent and compellable to give evidence either *vivâ voce*, or by deposition according to the practice of the court, or of either or any of the parties to the said suit, action, or other proceeding."

The exceptions are, first, that the husband and wife are not to give evidence in any criminal proceeding, or on any proceeding instituted in case of adultery; and secondly, that "no husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

The law therefore seems now to be that in suits in equity no *interest* of any kind, as such, whether by reason of being a party or otherwise, renders a person incompetent to give evidence for or against any other party; nor does *crime* of any kind.

The grounds of incompetency which remain untouched by the statutes are idiocy and lunacy.

An idiot, that is, a person from birth *non compos mentis*, or from birth deaf, dumb, and blind, is incompetent as a witness. So are lunatics, whether so found by inquisition or not, but lunatics may, in lucid intervals, be witnesses; and persons simply deaf and dumb, whether born so or not, are competent, and so are persons simply blind.

A person totally without religion, that is, not believing in the existence of a God who will reward and punish, is not a competent witness. The amount of belief generally required in practice, is belief in God and in a *future* state of reward or punishment. But semble that if a witness believes in God, and that he will reward or punish, *whether in this world or in a future state*, he is a competent witness: (see Willes, 550.)

A person believing the existence of God, and in a future state; that is, a pure theist, as a Jew, or a theist of the composite order, as a Mohammedan, is a competent witness, however he may differ in other respects from the Christian creed.

Infancy is a limited or qualified ground of incompetency. An infant is not, like a person of full age, *primâ facie* competent, nor is there any particular age fixed under twenty-one at which he is competent; but it must be shown in each case that he comprehends the nature and consequence of an oath. It is for the judge to satisfy himself on this point by a preliminary inquiry before the infant is sworn.

Those above enumerated are, I believe, now the only general grounds of personal incompetency. There are some special grounds of incompetency, such as that imposed by the 17 & 18 Vict. c. 83, *supra*, upon husband and wife, that they shall not be compellable to disclose communications made during the marriage; of the same kind is what is termed privileged testimony, of which partial mention has been already made in treating of production of documents; viz., the testimony of counsel, solicitor, or attorneys, touching matters of which they have acquired knowledge through confidential communications in the course of business, from their clients. On such matters those persons cannot be compelled, nor even permitted against the will of the client, to give evidence; whether the knowledge was acquired in, or in reference to, or in anticipation of the existing litigation, or without reference to it. It is sufficient that it was acquired by means of confidential communications made by the client to his legal adviser in his character of legal adviser; the privilege extends to the clerk of the privileged person; but it does not go beyond counsel, solicitors, and attorneys or their clerks.

A medical man is competent and compellable to give evidence on matters communicated to him confidentially by his patient; so a clergyman of the Church of England, and a Roman Catholic priest, are compellable to give evidence of matters come to their knowledge through confession.

Of documentary evidence.

Documentary evidence is of two kinds, matter of record, and matter not of record; that is, documents of a judicial or *quasi* judicial nature, which are publicly recorded, and of which the distinctive character is, that in general they prove themselves on production, and cannot be contradicted by any evidence; and instruments made between parties, which require extrinsic proof of their execution, and sometimes of collateral qualities.

Documentary evidence of record consists of acts of Parliament; the proceedings of Courts of Judicature; and such documents as are made by act of Parliament matter of record. All such documents prove themselves; that is, the production of them is sufficient proof without any testimony of witnesses. Thus, the probate of a will produced by the party relying upon it, is sufficient evidence of the will; the production of the record of a conviction, or of a judgment at law, or of a decree or other order in Chancery, would be sufficient proof of such conviction, decree, or order, and of the matters contained in it, without any further or other evidence. But

with regard to most of such documents, copies of a specific kind of the record itself are made evidence. Thus, a certificate of a conviction is in certain cases under the 7 & 8 Geo. 4, cap. 18, evidence of the conviction; the copies of acts of Parliament printed by the Queen's printer are admissible; and of all decrees and proceedings of record in the Court of Chancery, office copies duly certified are evidence in all Chancery proceedings; and in general, in proceedings in Chancery, the original record is not produced, but copies of bills, answers, and depositions are certified under the hand of the Clerk of Records and Writs (see 14 & 15 Vict. c. 99, and *Reeve v. Hodson*, 10 Hare, App. 19.) By the 7th section of the 14 & 15 Vict. c. 99, "all proclamations, treaties, and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or, in the event of such court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said court, and such judge is to attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement

are necessary, or of the judicial character of the person appearing to have made such signature and statement.

By the 10th section every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having in England or Wales by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

By the 12th section, registers of British vessels, and certificates of registry, are admitted as *prima facie* evidence of their contents, without proof of signature.

By the 14th section, whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy; any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

Parish registers, though not judicial documents, are public documents which prove themselves by production. Extracts from parish registers used to be admitted as evidence if signed by the proper officer to whose custody the original was intrusted, certifying themselves to be such officers. But since the 14 & 15 Vict. c. 99, it has been held that such registers signed by the persons who were the proper officers, and certified by them to be true copies, although they do not go on to certify that they were the officers to whose custody they were committed, are admissible: (*Re Neddy Hall's estate*, 17 Jur. 29.)

The Queen's letters patent are, as matters of public record, of the class that would prove themselves by production. In proceedings they may be proved by an exemplification from or constat of the enrolment of the letters patent under the Great Seal, which forms part of the patent.

The specification and its due enrolment are proved, if it is enrolled at the Enrolment Office, or in the Petty Bag, by an examined copy; but if it is enrolled at the Rolls Chapel, by a copy certified by the deputy keeper of the records, or one of the assistant keepers, and sealed with the seal of the Record Office.

As it is not the intention of this work to treat at large and minutely upon evidence, but only on its general principles and rules, I must refer the reader for a detailed statement of all the different kinds of documents which are of record or in the nature of documents of record, to the treatise of Mr. Powell, which forms a part of this *Practice of the Law*.

Of documentary evidence not of record.

Documentary evidence not of record or of a public character consists of all kinds of deeds or other instruments executed by or between parties.

The proper proof of such instruments is proof by the attesting witnesses; but if they are dead, or cannot be found, then by proof of their handwriting; but instruments more than thirty years old prove themselves, that is, they are admitted to be read as being executed between the parties between whom they purport to be made, without proof by the attesting witnesses, or of the handwriting of the attesting witnesses; of course it will be understood that if the identity of the parties to the deed is disputed, that must be proved. The proof of the deed simpliciter, proves only that such a deed was executed between some persons called A. and B.; but to show that it was the deed of the particular A. and B. to whom in the litigation it is attributed, there must be proof of identity, if the matter is disputed.

Letters are proved, either by the writer, or, if he is inaccessible, by proving the handwriting of the writer; and their delivery is proved either by proving their actual delivery when they have been personally delivered, or by proving the posting of them if they have been sent by the post, the court assuming that if posted they have been duly delivered. Of course such proof is capable of being rebutted by proof that no such letter was received, which may be by

the positive denial of the person addressed, that he ever received it, or by proof aliunde that such a letter was delivered and retained elsewhere. Books of account are proved by proving the handwriting of the person who has made the entries, and his identity so as to connect him with the persons whose accounts they purport to be ; but books of account, though evidence against the persons keeping them, are not in general evidence for them. But by the Chancery Improvement Act (the 15 & 16 Vict. c. 86) books of account may be received by the court in its discretion as *prima facie* evidence of the truth of the matters entered, for as well as against the parties keeping the books ; but the court will not so admit them except upon collateral evidence, not only that all other ordinary evidence that is procurable has been procured, but that the books have been kept in such a manner as to justify confidence in their general accuracy. On the latter point, the court will either require evidence or satisfy itself by personal inspection: (see *Ewart v. Williams*, 3 Drew. 21.) In equity proceedings there can rarely be any difficulty about the proof of books of account and such writings, because they are almost always, from their very nature, produced by the party who admits them to be his accounts.

In pedigree cases, to which a peculiar set of rules is applied (which will be discussed in a subsequent section), private entries in books, such as entries in family bibles, in diaries, family correspondence, and the like, and inscriptions on tombstones, engravings on rings, and other evidential marks or entries, are received as evidence of the truth of the matters entered.

It is a general rule that the best evidence that can be procured must always be tendered, and inferior, or, as it is termed, secondary evidence cannot be admitted unless it is proved that the best is inaccessible ; therefore, copies of deeds, or of any written instruments, cannot be produced in evidence, if the originals can be procured. But if it is proved that the originals are destroyed or lost, or are in the possession of persons who have a right to hold them and will not produce them, then secondary evidence in the shape of copies proved to be correct copies, will be let in. In equity, if either party has in his possession documents, the contents of which are material to the other party, he must give notice to his opponent to produce the originals at the hearing of the cause, before he can be allowed to produce secondary evidence ; and if the party possessing the documents either refuses or neglects to produce them, or producing them refuses

to let them be seen and read at the hearing, then, and not till then, secondary evidence of their contents may be read.

Of the testimony of witnesses.

The most frequent and important class of evidence is the parol evidence of witnesses. I have pointed out what classes of persons are incompetent wholly or partially to give evidence. It remains to show how those who are competent should give their testimony, what species of testimony from such persons may, and what may not be received, and for and against whom.

And first, of the mode of swearing witnesses. As to all competent witnesses of the ordinary kind and qualification, it is scarcely necessary to state that they are sworn on the New Testament. Jews are sworn on the Pentateuch, and take the oath with the hat on. A Gentoo has been sworn, or rather admitted to give evidence, on touching with his hand the foot of a Bramin. A Quaker is not sworn at all, but makes a solemn declaration. A Mohammedan is sworn on the Koran. A Chinese has been sworn on breaking a saucer, and declaring that if he did not speak the truth, his soul would be cracked like a saucer. Bearing in mind the principles laid down in *Ramkissenseat v. Barker* (1 Atk. 19), it may be presumed that the testimony of any person of whom it has been previously ascertained that he believes in God, and that God will punish him for a breach of his solemn oath, will be admissible, if he is sworn according to the custom of his country, or goes through the ceremonial, whatever it is, which, according to the custom of his country, is adopted in giving testimony in a court of justice.

When a witness has been sworn, he is first examined in chief, and upon the examination in chief some rules of importance prevail as to the questions which may be asked.

In the first place, the general rule is, that he can only be questioned on matters put in issue in the litigation. Of course this in practice affords a very wide latitude, as it is next to impossible to say that a question however apparently irrelevant, may not be of a distant relevancy; and in practice, if the examining counsel alleges that his question has in his own mind a bearing upon the matters in issue, the court will rarely stop him. However the rule exists, and must not be lost sight of in considering what evidence is admissible.

The next rule is, that leading questions must not be put; this is construed to mean that you must not, in an examina-

tion-in-chief, put such a question as will inform the witness or put into his mind, the sort of answer you wish. Thus for example, you may not ask a witness "did you not at the house of A. B. on such a day see A. B. do so and so?" because that shows the witness that you wish him to prove that particular fact. But the question ought to be in this wise: "When you were at the house of A. B. on such a day, what did you see him do?" It is obvious that the rule about leading questions is of the easiest possible evasion; and, indeed, in practice, it is every day, and every hour of every day effectually evaded; because, to say nothing of the facility of putting a leading question in an unleading form so that it cannot be objected to, the objection can only be taken when the question has been actually put, and then the mischief is done; the witness has been informed by the question what is the answer wanted, and while the counsel are arguing the objection, and the judge deciding upon it, he collects himself to make the answer that he thinks fit to give. Though leading questions are therefore much objected to at common law, and are particularly opposed on criminal trials, probably for some reason arising out of the constitution and idiosyncrasy of juries, in Chancery, counsel seldom take much trouble to object to leading questions, knowing that the judge, being neither aided nor incumbered by a jury, will, in weighing the credibility of evidence, cast into the balance the just number of grains due to the mode in which it is extracted; and accordingly in equity, arguing objections to questions on the ground that they are leading, is almost entirely neglected as being a pure waste of time.

Another rule of examination is one which flows from the general rule affecting all evidence, viz., that the tribunal must be supplied with the best evidence that can be got. Consequently, a witness may not be asked to depose by parol to the contents of any written document accessible and admissible. Therefore, if a letter has been written by the witness or by any other person, the witness may not be asked whether he wrote or saw such a letter, and whether it did not contain such and such matter, but the letter should be put into his hands to prove the writing of it, and then the contents of the letter will be read from the letter itself. A witness can in general only be heard to prove what is in his own knowledge or observation; that is, he cannot be allowed to give evidence of facts of which he received the knowledge from another; because the proper person to testify to those facts is the person from whom he derived the knowledge. Thus, a witness cannot be heard to say that he

was told of a given fact by another, that is, if the object of the evidence is to show the truth of the fact; but if the evidence is tendered not to show the fact, but merely to show that A. B. did make an assertion, then of course the testimony would be admissible. The distinction will be made easily perceptible by an example:—If the issue was whether A. had slandered B., the witness might prove that he heard A. say that B. was a scoundrel. But if the issue were whether B. had stolen a horse, the witness could not be heard to say that A. had told him he saw B. steal the horse, for this would be what is called hearsay.

Another rule is, that a witness is not bound to answer questions the answers to which would criminate or tend to criminate himself: (*Paxton v. Douglas*, 16 Ves. 239.) But this must be understood in equity to be confined to answers which would implicate or tend to implicate him in the penalties of a *criminal* transaction. A defendant in equity was always obliged to answer as to facts which might produce a civil decree against him; and so, a witness in equity, whether a party or not, cannot protect himself from answering any question merely because it tends to his civil injury; though he might always, and may still demur to any question tending to involve him in penalties, or *forfeiture* in the nature of a penalty. Thus, a witness may be asked whether he did or did not do an act which would be a breach of trust. But a lessee could not be asked whether he had neglected to insure in breach of his covenant, because that would create a forfeiture; nor could he be asked whether he had done an act which, under any act of Parliament, or at the common law, would expose him to penalties; as for instance, whether he had not knowingly and purposely affixed an insufficient stamp to a deed, because that would expose him to penalties under the Stamp Act. But whether the answer would or would not tend to criminate or to involve the witness in penalties or forfeitures, is a question for the decision of the judge, not of the witness, if the validity of the objection is disputed.

Whether a witness may be asked questions irrelevant to the issue, tending to degrade his character, as whether he had not suffered some infamous punishment, or been guilty of some disgraceful transaction not material to the question in issue, is a point still in doubt. Mr. Phillips, in his *Treatise on Evidence* (vol. 2. p. 493, *et seq.* edit. 1852) cites a considerable number of cases for and against. The result seems to be that the better opinion is, that he is not compellable to answer such questions; but that is his privilege, not the

privilege of the party examining him, and therefore it is not unlawful to ask the question (see however *Frost v. Holloway*, cited in the book above referred to, p. 500); and if the witness chooses to answer, his evidence is admissible, and the party asking him is bound by his answer: (see *Watson's case*, Gurn. vol. 2, 228.) The distinction seems somewhat confused and absurd, since it is difficult to see how a question can be lawful, to which it is not lawful to compel an answer. On the whole, the doctrine must be considered as still vague and unsettled. However, to whatever extent the witness's privilege goes, he may claim it at any part of the inquiry, whether he has already partially answered or has not answered at all: (*Garbett's case*, Den. Cr. Cas. Reserved, 236.)

When a witness has been sufficiently examined by the party calling him, he may be cross-examined by the opposite party. On cross-examination, much greater latitude is allowed in regard to the mode of questioning. The general rule to be collected, seems this: in cross-examining, the party examining is not confined strictly as to relevancy to the question in issue. He may ask questions affecting the credit of the witness, although not relevant to the matter in issue, and consequently may travel into a variety of transactions with that view, which have nothing to do with the matter. But he may not ask questions as to facts not relevant, and not affecting the credit of the witness.

But care must be taken to distinguish from this last rule, cases where the questions go to elicit answers as to transactions with third persons, showing that the transaction alleged in the cause between A. and B., was in fact between A. and C.: (see *Gerisp v. Chartier*, 1 C. B. Rep. 13.) ⁽¹⁾ In truth such a question, although apparently relating to transactions between third parties, is in reality relevant, because it tends to show that there was no such transaction between the parties to the record, as that which is put in issue.

Also, in cross-examination, any amount of leading in the questions is permissible. The distinction seems founded on no tenable principle; for the reason given, viz., that where a witness is unwilling (as witnesses under cross-examination are assumed to be, and in fact usually are), there can be no danger in leading too much, is obviously no reason at all.

⁽¹⁾ The case of *De Rützen v. Farr*, 4 Ad. & El. cited by Mr. Phillips on this point, (p. 470) has no bearing upon it.

A leading question in cross-examination tends just as much to show the witness what he is to negative, as it does on examination-in-chief to show him what he is to affirm. However, so is the rule.

After cross-examination, the witness may be re-examined by the party who called him.

Re-examination is confined to such matter as is relevant to the cross-examination, and must not travel into new matter properly belonging to, and as to which the witness might have been examined in chief. If it is thought necessary to go into any such fresh matter, the course is to ask the judge to put the question, which he may do, if he thinks fit; and in fact the judge will, at any time after a witness has been examined, permit a particular question (otherwise in itself admissible) to be put, tending to get rid of objections beside the justice of the case, and little more than matter of form; but not questions tending to the merits and justice of the case: (*Giles v. Powell*, 2 Car. & Pay. 269.)

A witness must, in strict theory, speak from his memory. But as this, without assistance, is in complex matters practically impossible, he is allowed to refresh his memory, as it is termed, by reference to written memoranda. On this point the minute distinctions are too many to be pointed out within the limits to which in this work the subject must be restricted. But the principle may be thus stated:—The memoranda must be used as refreshing or exciting the memory merely, not as substantive evidence; that is, the witness may so use the memoranda, that having done so, he recollects and takes on himself to swear to the facts as being in his memory; but he may not prove the facts merely as finding them in the memoranda. If the memoranda are to be so used, that is, if the evidence is in fact in the memoranda, and not in the memory of the witness, the memoranda themselves must be proved and used as evidence: (see *Rex v. Inhabitants of St. Martin*, 2 Adol. & Ell. 210, and the cases there cited.)

Presumptions.

I proceed now to treat of certain classes of evidence not being the positive evidence of documents which prove themselves, or are proved; nor the positive evidence of witnesses who depose to what they know of their own knowledge or memory.

The principal of these classes are, presumptions; and

secondary evidence; and in particular, as a part of the second class, hearsay evidence.

Presumptions are of law, or of fact. Presumptions of law are those conclusions which the court will adopt as incontrovertible; or as uncontroverted, though not incontrovertible, arising from rules of law. Presumptions of fact are inferences of fact drawn from evidence not of the fact itself, but of other facts which, according to the best conclusions at which human reasoning is supposed capable of arriving, necessarily prove the fact presumed.

Of the former class there are many, some of them no doubt very absurd; for instance, that every one knows the law; a presumption of law continually acted upon in deciding on the construction of wills; that every one (in the absence of proof to the contrary) has acted rightly and honestly; a presumption acted upon very frequently in equity, in determining on the conduct of persons in a fiduciary character; that the child born within the proper or possible period, of parents having the possibility of access to each other, is the legitimate child of those parents; that a deed thirty years old, was executed by and between the parties by and between whom it purports to be executed (a point noticed already, *ante*, p. 112); that a person proved to have been living within some given period is still living, or the contrary; that a person proved to have left the country, and not heard of for seven years, is no longer living; that public officers have done all the formal acts which it is their duty to do, as in *Coombes v. Mansfield* (3 Drew. 193), where the court would not hear evidence to show that the proper officer had registered a ship without seeing that she was in such a state as required by the Ship Registry Acts, for the purpose of registry; that sealing and delivery of a deed may be presumed on proof of its being signed. And a variety of others, which it would be far beyond the limits of this work to point out in detail.

Presumptive evidence of the kind above pointed out, is evidence rather resting on judicial rules, or judicial custom, by which certain facts being given, certain inferences are to be taken to be true, than on any actual practical belief in the mind of the judge, or, at common law of the jury, they are actually true.

What are called presumptions of fact, to distinguish them from presumptions so founded, are more properly the inferences which the judge or the jury may lawfully draw from certain facts. These are obviously more matter of discretion; but still they are not wholly unsubjected to rule and

custom. Of this class, for instance, is the presumption against the truth of the whole of the evidence of a witness, proved to have deposed falsely (and wilfully so) in some parts of his evidence. Of the same class is the presumption that an agent has done acts under the authority of his principal; a rule of evidence on which in fact rests the general rule of law, that a principal is responsible for the acts of his agent. This kind of presumption may sometimes be rebutted by evidence, in which case, it is strictly presumption of fact; and sometimes it will not be allowed to be so contradicted, and then it is in reality a presumption of law.

Of hearsay and other inferior evidence.

There are classes of cases, in which hearsay and other evidence of an inferior character, in the nature of presumptive evidence, is admissible. Pedigree cases form a considerable portion of this class. In pedigree cases, from their very nature, secondary evidence, and in particular, that class of secondary evidence called hearsay, must be resorted to; for it is obvious, that when the matter to be proved is the descent of a claimant from some person who has been dead perhaps one hundred or one hundred and fifty years and consequently the identity and family connexion of parties is to be proved, most of whom have been dead for some generations, no evidence can be accessible as to many matters, except the declarations of deceased persons; and as to many others, no evidence frequently is accessible, except that species of writing which, proving collateral facts, leads to an inference of the facts sought to be established. Accordingly, in pedigree cases, entries of various kinds (which would, in proving a case where the facts could be proved by the testimony of witnesses, be wholly rejected) are admissible in evidence.

Thus, entries in family bibles or prayer-books may be given in evidence to prove links in the chain of descent; entries in a bible are evidence, without proof of the entry having been made by a member of the family, because a family bible is considered as in the nature of a family register. But entries in prayer-books, almanacs, and other family documents, not being family bibles, must be shown to have been made by members of the family, or to have been treated by members of the family as correct entries, before they can be admitted as evidence. So, family correspondence, in which one proved member of a family addresses another person as a relation, is admissible in evidence.

Again, recitals in deeds, either being family documents, or being deeds to which a member of the family was a party, are admissible evidence; but this is properly evidence in the nature of a declaration by a member of the family. Engravings on rings, charts of pedigree, inscriptions on tombstones, and on monuments, and the like, are also *admissible*; but such evidence is of the weakest in point of effect.

Declarations of dead members of a family, that is, persons connected with it by blood or affinity, as to who were their relatives, are admissible.

Thus, having established that A. was a member of a given family, proof that he had spoken of B. as his brother, is admissible. It was formerly doubted (and the point is even now not always clearly understood) whether such hearsay may be double; that is, whether proof of a declaration by A., a member of the family, that B., another member of the family, had made statements as to the pedigree of the family (which is double hearsay) is admissible; but it is clear that it is: (*Monckton v. Attorney General*, 2 Russ. & Myl. 165.)

The declarations must, however, be by members of the family; and declarations by servants, friends, or even medical attendants, are not admissible. With respect to the evidence of persons connected only by affinity, the admissibility of declarations by such persons is confined to the declaration of a husband as to his wife's pedigree. The declaration of a man's wife's sister would not, for instance, be admissible to prove the man's pedigree, although she is related to him by affinity.

I have stated that the declarations must be by a *proved* member of the family; the rule as to the proof on this is, that the fact of the declarant being a member of the family must be proved *aliunde*, that is, by extrinsic evidence, and not out of the declaration itself. Thus, a declaration by A. that he was the son of B., would be nothing in order to let in his evidence, if there were no other extrinsic proof that A. was the son of B.

This rule is indeed so obviously founded on common sense, that it is wonderful it should ever have been the subject of solemn discussion. For, the value of a declaration by a member of a family as to its state depending on the supposed knowledge which he possesses as a member of the family, of what force can that declaration be until it is first ascertained, by something more than his own statement, that he is a member of the family? The rule is well settled, and admits of no exception.

Such declarations, to be admissible, must have been made before the commencement of the litigation in which they are tendered, the commencement of the litigation being understood to mean, not merely the commencement of an *action* or the *filing of a bill*, but the commencement of the *dispute*. But this does not exclude declarations made expressly to prevent a possible or anticipated dispute, provided no dispute in the nature of a claim and resistance to it has actually commenced.

There remains another class of evidence to be considered, viz., the evidence of professional persons, or persons otherwise of the class of *experts* in matters of science and skill. Evidence of this kind is, in the general course of equity business, by reason of its relating only to property, of more limited use than at common law. In equity it is rarely required, except upon questions of patent right, copyright, engineering, building, or surveying, and sometimes in cases of nuisance.

The general rule of evidence is that it must be as to facts; but, in cases of the class above mentioned, evidence of *opinion* is admissible. Thus, on a motion for an injunction to restrain infringement of a patent, an engineer, or a patent agent, or any person skilled in the art to which the invention relates, may be asked whether, *in his opinion*, a particular part is calculated to produce a given effect, or whether it is different from an apparently corresponding, and apparently similar, part in another mechanical process. And the evidence of scientific persons swearing that they have never heard of a certain invention before a given date has been admitted as *prima facie* proof of novelty of the invention, throwing the onus of proof of no novelty on the other side: (*Galloway v. Bleaden*, Webs. Pat. Cas. pp. 525, 526.)

So in cases of infringement of copyright of literary or musical composition, the opinion of literary or musical men is admissible in evidence, on the question of novelty and imitation.

And in cases turning upon the compliance of companies in the execution of engineering works, with the terms of the act of Parliament under which they claim, and are bound, the opinion of engineers as to the sufficiency or effect of given works is admissible: (see *Warner v. The North and East Counties Railway Company*, 2 Rail. Cas. 380, in which the mode of dealing with such evidence as to credibility is shown.)

So, in cases of nuisance, the opinions of medical men, chemists, and other persons whose occupations are such as to raise a presumption that they are skilled in the particular

subject out of which the nuisance grows or is alleged to grow are receivable in evidence.

The admissibility of such evidence does not extend beyond its immediate bearing upon the subject of skill on which the opinion is tendered.

XIX. *Of amending Bills.*

I have hitherto treated the subject of practice on the assumption of the cause proceeding without collateral interruption, viz., supposing that, the bill being filed, and being duly answered, no alterations are requisite, but that the suit proceeds at once through the regular course of issue being joined, and evidence being gone into, and then the cause coming on for hearing.

It most usually happens that, by the effect of the answer, when an answer is required, or by reason of further information irrespective of the answer, the bill requires amendment before the plaintiff is prepared to proceed with the cause.

When a bill has been filed, the plaintiff may amend it *as of course* as often as he likes before any answer has come in: (64th Order, 8th May, 1845.) The order to amend is obtained by a motion or petition of course, to be obtained as pointed out *ante*: (see pp. 13 and 81.)

So, an order for leave to amend a bill, only for the purpose of rectifying some clerical error in names, dates, or sums, may be obtained *at any time* upon motion or petition, without notice: (66th Order, May, 1845.)

And an order of course for leave to amend a bill, as the plaintiff may be advised (that is, to amend generally) may be obtained at any time before filing or undertaking to file replication, and within four weeks after the answer or the last of several answers is to be deemed sufficient; but no further order of course for leave to amend a bill is to be granted after an answer has been filed, unless in the case provided for by the 65th Order of May, 1845: (66th Order of May, 1845.) It has been held under this order and the 16th of the same Orders, that after one of several defendants has put in a sufficient answer, the plaintiff cannot obtain more than one order to amend, although the other defendants may not have answered: (*Duncombe v. Lewis*, 10 Beav. 273.) And although an insufficient answer is for many purposes no answer, yet, when a defendant put in an insufficient answer, and the plaintiff obtained an order of course to amend, and that the defendant might answer the amendments and exceptions together, and no amendment

was made within the fourteen days, it was held that the plaintiff could not obtain a second order of course to amend: (*Dolly v. Challin*, 11 Beav. 61.)

An order for leave to amend *after* replication, by *adding parties* where *no new issue is thereby tendered*, has been held to be an order of course (*Bryan v. Wastell*, 1 Kay App. 47), but the 65th and 66th Orders of 1845 do not appear to have been called to the attention of the court in that case.

Except in cases within the above orders, a bill can only be amended pursuant to *special order*, which is now, as stated *ante* (p. 82), to be applied for by summons in chambers, and with such affidavits in support of the application, as are referred to in the 68th and 69th Orders of May, 1845; as to the requisites of which affidavits, see *ante*, p. 84.

Bills may be amended in various ways, either by the insertion of different matter or new parties; or by striking out part of the matters originally alleged, or some of the parties originally made, or by altering the complexion of the matters alleged, and shifting the position of the parties; but the entire character of the bill must not be changed, under the common order to amend, nor will, in general, leave be given on a special application to make by amendment any such total change of the character of a bill: (see *Thomson v. Judge*, 2 Drew. 414.)

Formerly the rule as to amendment was, that nothing could be introduced by way of amendment, which did not exist *at the time the bill was filed*; matter subsequently arising being matter for a supplemental or for some other kind of bill, not being an amended bill. But now, by the 53rd section of the 15 & 16 Vict. c. 86, it is not necessary to exhibit any supplemental bill for the purpose only of stating or putting in issue facts or circumstances which may have occurred after the institution of any suit; but such facts or circumstances may be introduced by way of amendment into the original bill of complaint in the suit, if the cause is otherwise in such a state as to allow of an amendment being made in the bill. There is another clause in the act relating to bills of revivor and supplement, which will be presently noticed. Bills of revivor and supplement are, however, still sometimes requisite, as will be shown in the succeeding section of this work.

As to amendments by altering the state of parties, a bill may, under an order of course for leave to amend, always be amended by adding *defendants*, or by striking out the name of a defendant before he has answered. If, however, he has

appeared, he must be paid his costs. So the plaintiff may, under the common order, amend by striking out the name of a *co-plaintiff* if no defendants have appeared; but if any defendant has appeared, leave for such an order to amend must be obtained by a special application; and on making such an order, the court will take care to provide for the costs of the defendants already incurred: (see *Brown v. Sawyer*, 3 Beav. 598.) So in *Fellowes v. Deere*, (3 Beav. 353), where liberty was given to amend, there being a great number of plaintiffs, and the bill was amended by striking out the names of all the plaintiffs but one, who then sued on behalf of himself and all the others, although the court said the order was clearly irregular, it allowed the amended bill to stand, security being given for costs.

The amendments and the original bill form together but one record, viz., the amended bill.

Amendments, like the original bill, must be signed and are always drawn by counsel. And it is irregular for the solicitor either to insert amendments without the sanction and signature of counsel, or having inserted them, to strike them out again without obtaining the signature of counsel for such further alteration: (see *Burch v. Rich*, 1 Russ. & Myl. 156.) The broad rule is, in fact, that the bill as it is must be the bill of counsel.

The time allowed to a plaintiff to amend his bill is fourteen days after the date of the order to amend (16th Order, May, 1845, *ante*, p. 34), if the order is not made without prejudice to an injunction; but if the order is so made, the amendment must be made within seven days from the date of the order. An order to amend did not, however, before the 15 & 16 Vict. c. 86, prejudice a *special* injunction, and it was not necessary that the order should be expressed to be without prejudice, and the plaintiff had accordingly his fourteen days, without prejudicing any special injunction obtained by him. Now as the 16th Order of May, 1845, applied only to the common injunction, and as the common injunction is now abolished, it would seem that the practice must now be that, in all cases, that is, in cases of injunctions to stay proceedings at law, as well as in the case of any other special injunction, the plaintiff will have fourteen days to amend without prejudicing his injunction. The result of not amending within the regular time is, that the bill stands as if dismissal for want of prosecution, in the same position as if the order to amend had not been made.

Amendments in the modern printed bills may be made in writing on the sheet interleaved in the printed bill (7th

Order of 7th August, 1852), without a reprint of the bill, provided that no single amendment exceeds two folios in length; and the amendments are copied in the printed bill filed, and the bill so amended is filed by the Clerk of Records and Writs. If any amendment does exceed that length of two folios, the bill must be reprinted and the new printed bill must be filed. Copies of the amended bill must in either case be served, being first stamped, on the defendant or defendants in the same manner as has been pointed out in reference to original bills: (see *ante*, Sect. I., and also pp. 15 and 16.)

The order to amend on a special application for leave in chambers follows the general principle pointed out in p. 22, in reference to orders made in chambers; viz., it is the judge's order and not the chief clerk's. If heard by the chief clerk, and not brought before the judge within fourteen days for his opinion, and only signed by the judge *pro formâ*, the judge will hear an appeal upon it by summons or motion to himself. But if the parties, being dissatisfied with the clerk's certificate, desire and take the opinion of the judge upon it upon the clerk's certificate, before it is signed by the judge, and then the judge signs it, the appeal is to the Court of Appeal: (see *ante*, p. 85.)

As to obtaining leave to amend a bill after replication, that is always a question of the greatest speciality, and the court will not be too ready to give such leave. In almost all cases it will only be granted on the terms of the plaintiff putting the defendant, in point of costs, in the same situation as if the bill had been originally right. That is, it will make the plaintiff pay all the costs to which he has put the defendant by so much of the steps taken by him as he wishes to retrace, and the costs of the application (see *Champneys v. Buchan*, 3 Drew. 5.) The proper application in this state of things is, for leave to withdraw replication and to amend.

When a plaintiff amends, he pays costs in the following manner. Before any answer, he may amend without costs, for in fact he occasions, by then amending, no costs. After answer, for the same reason, he may amend without costs if he *requires* no further answer. But if, after answer, he amends by order of course requiring an answer, then he pays twenty shillings costs. On the obtaining of special leave to amend, the costs to be paid are in the discretion of the court; they will generally be merely the costs of the application, but in special cases, such as when the court sees that the defendant is, by the plaintiff's being permitted

to amend, put to costs *ultra* those of the application, as in *Champneys v. Buchan*, cited *supra*, the principle acted on in that case would regulate the order as to costs. The costs must be in all cases paid before the bill can be amended, that is, before the amended bill can be regularly filed. If there are any irregularities in the order to amend, the defendant should take his objections to them before the payment of the costs, for, if he accepts the costs, he waives any such irregularities: (see *Tarleton v. Dyer*, 1 Russ. & M.)

Amending the bill has some important effects on the proceedings technically, irrespectively of any substantial change in the suit. Thus, if a defendant is in a position to move to dismiss for want of prosecution, the plaintiff, by amending, and drawing up and serving his order before any notice of motion to dismiss, precludes the defendant from giving any such notice. But the order must be drawn up and served, to produce this effect, on the general principle of the court, that an order not drawn up and served, is (except in certain special cases) no order binding on the opponent. So, amending after an order to take the bill *pro confesso* has been held to destroy the effect of such order: (*Weightman v. Powell*, 18 L. J. 71, Chan.) Again, if a plaintiff amends his bill materially after answer, he cannot move upon the answer to the original bill for production of documents, because the answer to the amended bill might displace the equity for production: (*Haverfield v. Pyman*, 2 Phil. 202.) *Chidwick v. Pebble* (6 Beav. 264), which was not cited in *Haverfield v. Pyman*, appears opposed to this. The grounds of the judgment are not stated. However, in the latter case the plaintiff had not actually amended his bill, but only obtained an order to amend.

So, although the amendment of a bill does not prejudice a special injunction between the same parties, yet, if the amendment consists in introducing another plaintiff on the record, that does destroy the injunction, because, the bill being totally altered, it is impossible for the defendant to do what he is required to do in order to get rid of the injunction, viz., answer the original bill: (*Attorney General v. Marsh*, 16 Sim. 572.) But amending a bill after obtaining a *ne exeat*, does not discharge the *ne exeat*, if the amendments do not alter the substance of the case. But if they introduce matter substantially new, semble, it would be otherwise: (*Grant v. Grant*, 5 Russ. 189.) And it must be borne also in mind, that if an injunction is moved for, and either obtained or not obtained, although on an appeal motion for the injunction, or on resisting a motion to dissolve by way of appeal,

further evidence might be read for or against the original bill, yet, if it has been in the mean time amended, new evidence in support of the injunction cannot be grounded on the allegations of the *amended bill*: (*Prince Albert v. Strange*, 1 Macn. & Gord. p. 47.)

XX. *Of Bills of Revivor and Supplement, of Supplemental Proceedings and Abatement generally.*

A suit may be abated or rendered defective, so that it cannot proceed in its existing state, by several events; as the death, marriage, bankruptcy, or insolvency of any party to the suit, or the birth of any person who, on coming in esse becomes interested in the subject matter of it; or the happening of any event, which so far changes or affects the interests of the parties, that if a decree were made in that state of the suit, it would not clearly dispose of every particle of interest in the suit; such events will render it defective either by what is technically termed *abatement*, or simply defective without being actually *abated*, and the defect must then be cured before the suit can proceed. Defects of this kind were formerly remedied by bills of revivor, or bills of supplement in the nature of bills of revivor; and the general distinction was this: If the defect of the suit arose from the death of a party whose interest was transmitted to his *real or personal representatives*, so that the *title* of the new party when the *person* was once ascertained could not be disputed, the defect was to be cured by a *bill of revivor* simply. But if the defect arose from the transmission of interest to persons not claiming *under the law*, but under the *acts of parties*, as in the case of the bankruptcy or insolvency of a party, or his death, having devised real estate, then the method of cure was by a supplemental bill in the nature of a bill of revivor.

Further, without having become defective after being originally complete, a suit may be so affected by events happening after the institution of the suit, that without the events being brought before the court, complete justice could not be done; and, under the old practice, no event so happening could be brought before the court by way of amendment, but a supplemental bill, or a supplemental bill in the nature of an original bill, was requisite. Matters of this kind are now the subject of a section of the 15 & 16 Vict. c. 86.

The 52nd section of the 15 & 16 Vict. c. 86, enacts that, upon any suit becoming abated by death, marriage, or otherwise, or defective by reason of some change or trans-

mission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings; but an order to the effect of the usual order to revive, or of the usual supplemental decree, may be obtained as of course upon an allegation of the abatement of the suit, or of the same having become defective, and of the change or transmission of interest or liability. And an order so obtained, when served upon the party who, according to the present practice of the court, would be a defendant to the bill of revivor or supplemental bill, is from the time of such service binding on such party, in the same manner in every respect as if such order had been regularly obtained according to the existing practice of the court.

And the 53rd section enacts, that it shall not be necessary to exhibit any supplemental bill in the said court, for the purpose of stating or putting in issue facts or circumstances which may have occurred after the institution of any suit; but such facts or circumstances may be introduced by way of amendment into the original bill of complaint in the suit, if the cause is otherwise in such a state as to allow of an amendment being made in the bill, and if not, the plaintiff shall be at liberty to state such facts or circumstances on the record, in such manner and subject to such rules and regulations with respect to the proof thereof, and the affording the defendant leave and opportunity of answering and meeting the same, as shall in that behalf be prescribed by any General Order of the Lord Chancellor.

Now first as to *revivor* and to what kind of cases the 52nd section of the act applies. It has been decided that the court has no power to go beyond ordering the suit to be revived, so that it can be carried on as if the new parties had been originally parties; and hence when an order was granted to revive against executors, the court refused to insert that they might admit assets, or that the accounts of their testator's estate might be taken: (*Dean and Chapter of Ely v. Edwards*, 22 L. J. 629.) And so, when there were originally two plaintiffs and the defendant died, and one of the plaintiffs became his representative, and the other sought to revive the suit as against the representative of the deceased plaintiff, the court said that could not be done under the 52nd section of the act, as it required more than the common order to revive, or the usual supplemental decree.

Where all the children of certain persons are necessary parties to a suit, and after decree one is born, and no pro-

ceedings taken since that birth, an order for the usual supplemental decree under the 52nd section may be made: (*Fullerton v. Martin*, 1 Drew. 238.)

But the 53rd section does not apply *after decree*, nor before decree for bringing *new parties* before the court, but only for bringing forward new facts between the same parties. If new parties are to be brought forward, a supplemental bill is requisite: (*Commerell v. Hall*, 2 Drew. 194.)

The 52nd section applies to cases where the rights of the plaintiff are affected by a settlement executed after the institution of the suit: (*Atkinson v. Parker*, 2 De G., Macn. & Gord. 221.) And under the same section in a creditor's suit, a person found a creditor by the master is entitled to an order to revive: (*Lowes v. Lowes*, 2 De G., Macn. & Gord. 784.)

The order to revive merely is an order of course (*Bonfil v. Purchase*, 16 Jur. 965); but an order for the usual supplemental decree is made in open court: (see *Martin v. Hadlow*, 9 Hare, App. 52.) The statement of the facts in which the order to revive or the supplemental order is made, is received on allegation without proof.

The course of practice is to draw up such statement, intituled in the cause, as a collateral statement, which is engrossed on parchment and filed in the Writ and Record Clerk's office. The order is to be served on the parties to the suit, and appearance is entered as to a bill of revivor or supplement: (52nd sect. of 15 & 16 Vict. c. 86.) Some conflict of opinion appears to have existed on the question whether, under an order to revive, appearance by the defendants served is necessary: (*Hanbury v. Ward*, 18 Jur. 222; *Ward v. Curtwright*, 10 Hare, App. 73; *Cross v. Thomas*, 17 Jur. 336; *Foster v. Mengies*, 10 Hare, 17 Jur. 657.) But the act seems to be imperative: it provides that the party or parties served shall "thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto in the office of the Clerk of Records and Writs within such time and in such manner as if he or they had been duly served with process to appear to a bill of revivor or supplement filed against him." Now, under the old practice, a defendant served with a subpœna on a bill of revivor was bound to appear, and if he did not was liable to the ordinary process of contempt, or the plaintiff might enter an appearance for him as he might have done to an original bill.

I apprehend, therefore, that the practice recognised in

the two last cases cited is the correct practice, and that appearance to either an order to revive or the supplemental order is requisite.

If the order is on matter supplemental, and the party obtaining it requires an answer, he must file interrogatories, as he would on a bill, and the defendants must answer as they would to interrogatories filed with a bill.

The parties to be served with an order to revive or a supplemental order are the parties who would have been required to be served as defendants to a bill of revivor or a supplemental bill. This, therefore, involves the question of the necessary parties to a suit, which is a question of pure pleading, and will not be here discussed.

Any party under no disability, or under the disability of coverture, served with an order to revive or a supplemental order, may, within twelve days after service, apply to the court by motion or petition to discharge such order upon any ground which would have been open to him on a bill of revivor or supplemental bill. And any parties under any disability, other than that of coverture, may apply within twelve days after the appointment of a guardian *ad litem* to such parties. And until the twelve days have expired, the order as against such last-mentioned parties is of no force : (52nd sect. of the act, and 43rd Order of 7th August, 1852.)

XXI. *Of Petitions.*

I have in a preceding section pointed out the general principle on which it is to be ascertained whether an interlocutory application in a suit should be by motion or by petition.

Petitions are in practice resorted to for a great variety of purposes, such as to obtain the payment of money out of court ; for stop orders upon funds in court ; for the appointment of trustees of charities under Sir S. Romilly's Act, and the 1 Will. 4, c. 60 ; for taxation of solicitors' bills of costs ; for the maintenance of infants ; for inquiries in a suit with reference to compromises, where there are infants in the suit ; and many others. And here must be noticed an error, though perhaps not a very material one, which is to be found in, I believe, all the books of practice, viz., that in vacation, an injunction is to be obtained on petition. This is stated on the authority of the Pract. Reg. 252 ; but it is not, so far as I am apprised, the practice. An injunction is universally in practice applied for, in as well as out of vacation, on a bill filed ; and I am not aware of any modern instance in which

it has been otherwise obtained, that is, in those cases in which, if the court were sitting, a bill would be requisite.

Petitions are presented in suits or without suit, and first, of petitions in suits. (I am here treating only of special petitions, that is, petitions on which, whether opposed or unopposed, the court exercises a discretionary jurisdiction in respect to the order to be made.) Of petitions of course sufficient has been said in previous parts of this work.

A petition may in general be presented by any party to a suit. If it is on behalf of an infant or a married woman, it is presented in the name of the infant by his guardian, or in the name of the married woman by her next friend. But the guardian or the next friend, as the case may be, is the party responsible for costs. It is entitled in the suit. It is headed, The petition of A., B., &c.; and is marked for, and is to be heard before, the judge to whose court the suit is attached. When the suit is at the Rolls, the original petition is presented to the Master of the Rolls, and answered by him; if it is in the court of either of the Vice Chancellors, it is presented to the Lord Chancellor, and is answered by him, and is then set down to be heard before the Vice Chancellor to whose court it is attached. Petitions may be drawn either by the solicitor or by counsel, or drawn by the solicitor and settled by counsel. But the solicitor is not entitled to charge in costs any fee for having a petition settled by counsel, the consequence of which is that most petitions are drawn by the solicitor without the assistance of counsel.

A petition should state succinctly all the facts on which the prayer is founded, and shortly, if possible, the substance of the documents on which it relies; for, if it sets out at unnecessary length deeds or other writings, the costs of such unnecessary matter will not be allowed. It concludes by a prayer for the relief to which the petitioner conceives himself entitled. When the draft is prepared, it is copied on paper, and such copy is taken to the office of the secretary of the judge to whom it is addressed, to be there left to be answered; and at the same time another copy must be left with the secretary of the judge who is to hear it, for his use before and at the hearing. When the petition is answered (which answering consists in the fiat of the judge, marked at the corner of the front page, that the parties do attend him on a day named), a copy of the petition and answer is served on all the parties who are interested in the subject matter of it. As to what parties ought to be served, generally the same rule that is applicable to motions is equally

applicable to petitions; viz., every person whose interest will be affected, however indirectly or remotely, by the order asked, is entitled to be served. The service must be two clear days before the day fixed for hearing the petition, exclusive of Sundays or other days on which the offices are closed, except Monday and Tuesday in Easter week: (16th Order, 1845, art. 47.)

The petition is set down to be heard by the direction of the secretary of the judge, and usually particular days are, during the sitting of the court, set apart for petitions, for which days a list of the petitions to be heard is made out in the Registrar's Office, of which list any person may see a copy in that office on the preceding evening; and the petitions are to be heard in the order in which they stand on the list, though usually the court hears the unopposed first. Care should be taken that in the judge's copy of the petition there are no blanks for names, sums, or otherwise, as the judge may, and sometimes will, if there are such blanks, refuse to hear the petition when it is called on. Briefs on petitions which are unopposed, may be delivered either to senior counsel with or without junior counsel, or to junior counsel only, that is, the costs of two briefs to counsel will usually be allowed. It is usual, and it is prudent, when petitions are of a complicated character, whether opposed or unopposed, to employ senior and junior counsel.

Petitions whether opposed or unopposed, must be supported by affidavits verifying all the material facts on which the right to relief rests; and if they involve questions of pedigree, the usual verifications of births, deaths, marriages, &c., by certificates and otherwise, and of the other facts establishing the pedigree, must be produced.

All parties, in general, who are entitled to be served and appear, are entitled to their costs, that is, where costs are given at all. And when a petition is served upon parties who have no claim or interest, they are, in general, entitled to appear and to have their costs. On this point, however, there is not exact uniformity in the practice of the different courts; but if a party by claiming an interest which it turns out he has not, makes it necessary to serve him with a petition, he will be refused his costs: (see 1 Macn. & G. 85, and 2 Beav. 202.)

If a petition being brought on is found to be defective or inaccurate in respect to some necessary statement, or is otherwise irregular, the court may and usually will permit it to stand over to be amended, which is done by inserting the amendments in the original petition, and procuring the

amended petition to be signed by counsel. But if the amendments would consist of the introduction of facts subsequent to the answering of the petition, they cannot be introduced by amendment, but either a new petition, or a supplemental petition, must be presented.

It is a technical rule of the court that *no declaration of rights* can be made on a petition. This rule must be thus understood, that you cannot on a petition in a cause obtain from the court an order determining the very question in the cause, and that you cannot by a petition not in a cause, obtain the same extensive and complete determination of rights which would be obtainable in a cause. But, in fact and in practice the court continually does determine both in cause petitions and in petitions not in a suit, very important questions of right. Thus, for instance, in a suit to administer an estate, the court, on the application by petition of a party claiming to be entitled to a sum of money paid into court, constantly determines the construction of a will or a settlement, and most effectually concludes the rights of the parties by ordering the money to be paid out. So, in the case of maintenance of infants, though the court makes no specific declaration of rights, it makes a very substantial disposition of rights on petition. And on petitions under Railway Acts for the payment out of money paid in by the companies by way of purchase money, the rights of parties are in fact frequently ascertained and declared. When an order is made on a petition, it must be regularly drawn up, passed and entered as any other order. And the order must be served on the parties to be affected by it.

XXII. *Hearing the Cause.*

When the evidence is closed on both sides, the plaintiff should, within four weeks from that period, set the cause down to be heard, otherwise any defendant may either move to dismiss the bill for want of prosecution (114th Order, 1845), or he may himself set the cause down to be heard. If the plaintiff sets the cause down, he obtains and serves on each of the defendants a subpœna to hear judgment. This is served usually on the solicitors of the parties, but it may be personal, and the service must be ten days before the return of the subpœna: (16th Order, 1845, art. 46.) To set down a cause, the solicitor obtains from the Clerk of Records and Writs a certificate that the cause is in a fit state for hearing. This certificate is to be

taken to the secretary of the Master of the Rolls, if the cause is before him; and to the Registrar's Office, if it is before one of the Vice Chancellors. And when the cause has been set down and subpœna to hear judgment served, the cause is put in the Registrar's Office in the list of causes to be heard; and the solicitors on both sides must watch from time to time the state of that list, as they are entitled and ought to prepare and deliver their briefs when the cause is in within twelve of the paper of the day, and not before. When the plaintiff, on the answers coming in, is satisfied with the evidence in his favour which they afford, and accordingly does not file any replication, he sets his cause down upon bill and answer, for which the course is the same as when it is set down upon evidence.

The plaintiff's brief, when the cause is to be heard on evidence, consists of a copy of the bill, of all the answers, and *all the evidence* on both sides. The defendant's brief should consist of a copy of the bill, of the *answer* of the particular defendant only, and of *all the evidence* on both sides. This seems to be now rendered requisite by the doctrine laid down in *Lord v. Colvin* (3 Drew. 222), in which it was held that defendant may cross-examine co-defendants as witnesses, and that when the evidence is taken, whether it be examination-in-chief or on cross-examination, the whole is common to all parties.

Upon the matters thus inserted in the brief, it is usual for the solicitor to append a few brief sheets of observations, pointing out to the attention of counsel, the principal features of the cause; and the substantial interests of the parties to be represented by the particular counsel. On the preparation of the observations, the reader is referred to the remarks made in p. 26 of this work.

If either party has any documents which the other side desire to have produced, and to read in the progress of the cause, the party desiring to use such evidence should give notice to his opponent to produce it. If he does not give such notice, not only can the opponent not be compelled to produce the documents, but the party desiring to use them cannot read secondary evidence of their contents. But if the plaintiff has proved a document in the defendant's possession, the latter must produce it at the hearing, although he has not been served with an order to that effect: (*Wheat v. Graham*, 7 Sim. 61.)

Every matter to be proved which admits of cross-examination, must be regularly proved in the manner already pointed out (*ante*, Sect. X.), but the mere execution of deeds

requiring nothing but proof of handwriting, may be proved *virâ voce* at the hearing, as of right, under an order of course for that purpose, which should be obtained before the coming on of the cause; or such documents may be proved by an affidavit of the party who would prove them *virâ voce*. This might have been done before the 15 & 16 Vict. c. 86, and may still be done; and it may be done when a cause is heard on bill and answer, as well as when it is heard on evidence, when the instruments are neither admitted nor denied by the answer: (*Chalk v. Raine*, 7 Hare, 393; *Rowland v. Sturgis*, 2 Hare, 520. But see *contrâ*, *Jones v. Griffiths*, 14 Sim. 262.) But now, in addition, the court may, at the hearing of the cause, require the production and oral examination before it of any witness or party in the cause, upon substantial matters of evidence requiring or allowing cross-examination. But this is discretionary in the court, not of right in the party: (15 & 16 Vict. cap. 86, s. 39.)

The plaintiff should always be prepared, at the hearing of the cause, with an affidavit of service of subpoena to hear judgment upon the defendants; if he is not, and the defendants do not appear, the cause will be struck out of the paper, whereas if he is so prepared, he will, on the defendant's not appearing, be entitled to take a decree; not, however, a decree according to the prayer of his bill without more; but he must open his case and read the evidence, and the court will give him such decree as it thinks him entitled to. On the other hand, the defendants should be also provided with an affidavit of having been served: and then, if the plaintiff does not appear, the defendants may have the bill dismissed with costs.

The course of hearing a cause is thus: the plaintiff's leading counsel states the nature of the case, and the facts that will be proved, and reads or refers to so much of the pleadings as he considers necessary to make his case clear; and he then argues upon the state of facts which he assumes: the junior counsel then reads so much of the defendant's answer and of the plaintiff's evidence as it has been determined to rely upon. If the defendant has cross-examined, his junior counsel reads the cross-examination, and the plaintiff's junior counsel reads the re-examination; and having done so, argues so much of the case as in his discretion he thinks requisite. It is a question of some doubt, whether junior counsel has a right to take a line of argument in any degree opposed to that of his leader; in practice no cautious junior ever does adopt such a course. The plaintiff's counsel having concluded, the counsel for the defen-

dants pursue the same course and in the same order; and then the plaintiff's senior counsel replies; after which, the court either at once pronounces judgment, or takes time to consider its judgment.

When a cause is brought on for hearing, it frequently happens that some defect of the record, or of parties, is suggested. If such an objection is sustained, the usual course is to direct the cause to stand over with liberty to amend, the plaintiff paying the costs of the day, if the objection has been brought to the attention of the plaintiff by the defendant's answers. But if it has not, the plaintiff will not be in general ordered to pay them any costs. The costs of the day are ten pounds, to be divided between all the defendants, unless the court otherwise orders. But, although, in anything approaching the character of a heavy case, ten pounds for the costs of the day is very inadequate, the court very rarely does otherwise order.

Causes when put in the paper, are sometimes pursuant to the original intention of the parties, sometimes by reason of arrangements afterwards come to, heard as short causes, that is without any argument, it being generally understood that no cause can be heard as a short cause, which requires more than the statement of the nature of the case, and submitting the questions to the decision of the court.

To set a cause down to be heard as a short cause, it is necessary that the plaintiff's counsel should certify it to be fit to be heard as a short cause, and the defendant's solicitor must consent in strictness. But the usual course is that, if the plaintiff's counsel certifies it as fit, it will be set down; and then at the time for hearing, unless the counsel on the other side states at the bar that it is not, in his opinion, fit to be heard, the court will so hear it.

XXIII. *Of the Decree.*

What is called the original hearing of the cause, may be divided into two classes. The hearing of a cause of a nature to require as of course inquiries, and in which usually nothing is determined at such original hearing; and the hearing of a cause in which all or most of the questions may be disposed of at once on the materials before the court.

The former class is much the most numerous in equity proceedings. For instance, in suits by legatees and others interested in the administration of the estates of deceased

persons, the original decree is rarely anything more than preliminary ; viz., it directs accounts of property and inquiries as to classes of persons and otherwise, on which the court must be satisfied, before the question of the rights of the parties can be determined.

So, in creditors' suits, the original decree is in the first instance for inquiries, viz., for an account of what is due to the plaintiff, and all other creditors of the deceased debtor ; an account of the funeral expenses ; of the personal estate come to the hands of the defendant the personal representative, or of any other person for him or by his order ; of what parts, if any, of his personal estate are outstanding ; and then a direction that his personal estate shall be applied in a due course of administration, and further consideration is adjourned.

So, in a suit for specific performance, the original decree is in almost all cases, first for an inquiry whether a good title can be made, and when it was first shown, and the further consideration, that is the substantial question whether the defendant should be compelled specifically to perform the agreement is adjourned. And in other cases, too various to be here enumerated, the court in the first instance does not go beyond directing inquiries and accounts.

When the decree, whether preliminary or final, has been pronounced, the first thing to be done is to get the minutes passed and entered. This is done by the solicitor of the party interested in carrying the decree into effect, leaving with the Registrar of the day the briefs of his counsel ; and minutes are then prepared at the Registrar's Office with the aid of these briefs, and delivered out to the solicitors of the parties on their bespeaking them. That being done, the solicitor having the carriage of the decree, serves on his opponents a notice of a day fixed with the Registrar for settling minutes ; and then all parties attend before the Registrar to settle the minutes ; in fact, the terms of the decree. If there is any difference between the minutes indorsed on the briefs of counsel, the minutes taken down by the Registrar in court, will be the guide to determine what was the decree pronounced, and the court as well as the Registrar will in general rely upon them. It is, therefore, very important in many cases that the solicitor should take care, before a cause is disposed of, to see that the Registrar has taken down any direction that is considered material for his client.

If, before the Registrar, the parties cannot agree with each other or with him as to what the decree was intended to be,

the party or parties dissatisfied apply to the court by motion on notice to have the minutes varied, or obtain leave to put the cause again in the paper, in order that it may be what is termed "spoken to on the minutes." But whether on a motion to vary minutes, or on speaking to minutes, the court will never *substantially* vary the decree which it has made; nor will it depart in any material degree from the Registrar's minutes, unless they are plainly opposed to the judge's own recollection of his decree. All that the court will in general do, is to declare and work out by consequential directions, what it intended to declare by the decree. All applications to vary a decree must be made to the judge who pronounced it, no other judge will interfere with it without rehearing the cause. When the minutes have been finally settled, the decree is drawn up by the Registrar, who delivers it to the party bespeaking it, and the other parties are entitled to have copies. The decree is then to be passed and entered; to pass it, an appointment must be made with the Registrar for passing, and the Registrar gives notice to all the parties to attend the passing; if they do not attend, he will pass the decree by affixing his signature to it without their presence. The decree has then to be entered, for which purpose the party having taken the original decree leaves it with the entering clerk of the division under which the letter of the name of the first plaintiff on the record falls; and he enters it accordingly. The decree is taken to be entered from the date of its being left with the entering clerk. Until the decree is entered, no proceedings founded upon it can in strictness be taken; but in practice, when it has been left for entering, office copies of it signed by the Registrar may be obtained, and acted upon in the suit. A decree founded on a bill taken *pro confesso*, is to be passed and entered like any other decree. All decrees, orders, and dismissions must be enrolled within six calendar months after being *pronounced*, and not at any time after, without special leave of the court: (2nd Order, 7th August, 1852.) If any party is desirous to enrol a decree, order, or dismissal, after the expiration of six calendar months from the time the same shall have been made, he must obtain an order for that purpose; and which order, unless made by consent of the adverse party, or on motion and notice to all the parties, will be a conditional order in the first instance, but will become absolute without further order, unless cause is shown against it within twenty-eight days after service of the order: (3rd of the same Orders.)

A caveat against the enrolment of any decree must be

prosecuted with effect, within twenty-eight days after the docket of the decree has been left to be signed by the proper officers, otherwise the caveat is of no force : (4th of the same Orders.) And no enrolment of any decree shall be allowed after the expiration of five years from the date thereof (5th of the same Orders), unless the time is enlarged under the 6th of the same Orders.

All proceedings necessary to be taken in the Court of Chancery upon a decree, may be taken as well without its being enrolled, as after it has been enrolled ; but until enrolled, it is not in strictness a record of the court, and will not be taken notice of as such by other courts. So, until it has been enrolled, it may be altered by the court which pronounced it, on rehearing. But after it has been enrolled, it can only be altered on appeal, or on a bill of review ; and when a decree of the Master of the Rolls, or of a Vice Chancellor has been enrolled, as for the purpose of being so, it is signed by the Lord Chancellor, it becomes technically his decree, and then an appeal only lies to the House of Lords. It is therefore of importance where parties desire to appeal direct to the House of Lords, passing by the intermediate Court of Appeal, to proceed with all possible rapidity to get the decree enrolled. A party obtaining an order from one of the Vice Chancellors under the Winding-up Acts, may enrol it so as to prevent the other party from appealing to the Lord Chancellor : (*Re the Direct London and Exeter Railway Company*, 1 Macn. & Gord. 534.

Whether preliminary decrees, that is, decrees directing accounts and inquiries, and not determining the final rights, can be enrolled, is a matter not quite clear ; the subject is ably discussed by Mr. Daniell in his work on Practice, p. 1003, *et seq.*, to which work I refer the reader curious on that point. In practice it is a point of very little importance, as not in one such case out of a thousand, is there the slightest benefit to either party from enrolling ; and consequently enrolling such decrees is never for one moment thought of. Mr. Daniell also discusses at some length, the question whether the enrolment of a decree is *necessary* before it can be carried up by way of appeal to the House of Lords, and suggests, as a conclusion from the authorities, that it is not necessary. That point, however, is now settled by *Broadhurst v. Tunnicliffe*, 9 Cl. & F. 71, in which it was laid down that the House of Lords will not hear an appeal against any order or decree of the Court of Chancery that is not enrolled, if the objection is taken ; and in that case the decree appealed against being ten years old, and no merits disclosed, the appel-

lants were refused time to enrol, and the appeal was dismissed with costs.

Either party, that is the plaintiffs, or any defendant, may enrol a decree. Any party desirous of preventing the decree being enrolled, enters a caveat against it, with the secretary of decrees of the Master of the Rolls, if the decree is at the Rolls; with the Lord Chancellor's secretary of decrees, if it is a decree of any Vice Chancellor. The caveat prevents the signing of the decree for twenty-eight days from the time when notice is given by the secretary of decrees to the other parties of the docket having been presented for signature within those twenty-eight days, as we have seen: (4th Order of 7th August, 1852, cited *supra*.) The caveat must be prosecuted with effect, that is, the party having entered the caveat must present his petition of appeal or re-hearing, and get it answered, and an order to set it down, and serve that order upon the other side (*Groom v. Stinton*, 2 Phil. 384); and so in *Dearman v. Wynch*, 4 Myl. & Cr. 550, a decree was enrolled after a petition of appeal, and the appeal set down, but before notice of the appeal was served on the party who enrolled the decree, and the enrolment was held regular.

The enrolment of a decree may under certain circumstances be vacated; thus, it may be vacated on the ground of surprise: (*Emaght v. Fitzgerald*, 8 Dr. & War. 72.) But it will not be vacated on the ground of mere surprise, that is, where the party enrolling has not done anything to induce his opponent to believe the decree would not be enrolled: (*Lewis v. Hinton*, 16 L. J. 268.) Thus, the enrolment of a decree after an intimation given on the part of the defendants to the plaintiff's solicitor of their intention to appeal forthwith, and a statement in reply that he was open to any fair offer of arrangement to prevent the necessity of an appeal, is not such a surprise as will induce the court to vacate the enrolment: (*Balguy v. Chorley*, 1 Myl. & K. 640.) Nor will an enrolment be vacated merely because it has been obtained with extraordinary haste: (*Higher v. Garnes*, 2 Y. & Coll. 335.)

XXIV. *Of enforcing Decrees.*

Before a decree can be enforced under the process of the court, there must be personal service of it: (*Whistler v. Aylward, re Fitton*, Drew. 1.)

A decree or order may now be enforced either under the Orders of the 26th August, 1841, or of the 10th May, 1839;

but it will be seen that the Orders of 1839 only provide for decrees for payment of money, and that while those Orders refer in express terms to *any cause or matter*, the Orders of 1841 down to the 15th, do not in terms use either the word *cause* or the word *matter*: they use the word *party*, and therefore by implication appear to be confined to the enforcing of decrees in a *cause*. Mr. S. Smith, indeed, in his recent work, lays it down positively that "the present remedy by attachment is confined to enforcing decrees and orders made in a *cause*, and the provisions of the Orders of August 1841, do not extend to orders made in a *matter*" (Smith's Practice of the Court of Chancery, 1855, p. 299), but he does not cite any authority for the proposition; and, as the 15th of those Orders gives the same remedies to a person not a party in any cause, as if he were a party to the cause, it would not, I apprehend, be safe to say, in the absence of authority to the contrary, that the remedies given by the Orders of 1841, are not as applicable in a *matter*, as in a *cause*.

The 10th Order of 1841, abolishes the old *writ of execution*. The old writ of execution was simply a process of the court necessary as a preliminary step, under its seal, reciting the decree and requiring obedience to it: (see 1 Newl. Pract. 684.) After the issue of that writ, if the party against whom the decree was made, paid no obedience to it, he was then, on proof of service of the writ, liable to the same process of contempt as would issue against a defendant for not appearing, or not answering. The order directs that no writ of execution shall hereafter be issued for the purpose of requiring or compelling obedience to any order or decree of the Court of Chancery; but that the party required by any such order or decree to do any act, shall, upon being duly served with such order or decree, be held bound to do such act in obedience to the order or decree.

What this order does, therefore, is merely to place the party affected by the decree, in the same situation at once, as he would have been in under the old practice, after service of writ of execution.

The 11th of the same Orders directs, that if any party who is by any order or decree ordered to *pay money, or to do any other act in a limited time*, shall after due service of such order or decree refuse or neglect to pay the same, according to the exigency thereof, the party prosecuting such order or decree shall, at the *expiration of the time limited for the purpose thereof*, be entitled to a writ or writs of *attachment* against the disobedient party. And in case

such party shall be taken or detained in custody under any such writ of attachment without obeying the same order or decree, then the party prosecuting the same order or decree shall, upon the sheriff's return that the party has been so taken or detained, be entitled to a commission of *sequestration* against the estate and effects of the disobedient party; and in case the sheriff shall make the return *non est inventus* to such writ or writs of attachment, the party prosecuting the same order or decree shall be entitled at his option either to a commission of *sequestration* in the first instance, or otherwise to an order for the *sergeant-at-arms*, and to such other process as he hath hitherto been entitled to upon a return of *non est inventus* made by the commissioner named in a commission of rebellion issued for the non-performance of an order or decree.

The order, it has been held, does not apply to a case of default by a party in producing deeds in the Master's office pursuant to a decree, in which case the sergeant-at-arms went upon a disobedience of the four-day order: (*Hobson v. Sherwood*, 6 Beav. 63.)

Every order or decree requiring any party to do an act thereby ordered, must state the time after service of the order or decree within which the act is to be done; and upon the copy of the order or decree which shall be served upon the party required to obey the same, must be indorsed a memorandum to the effect following:—

“If you the within named A. B. neglect to obey the order (or decree) by the time therein limited, you will be liable to be arrested under a writ of attachment issued out of the High Court of Chancery, or by the Sergeant-at-arms attending the same court; and also be liable to have your estate sequestrated for the purpose of compelling you to obey the same order or decree:” (12th of the same Orders.)

By the 13th Order of 1841, it is ordered that upon due service of a decree or order for *delivery of possession*, and upon proof made of demand and refusal to obey such order, the party prosecuting it shall be entitled to an order for a *writ of assistance*.

With regard to persons *not parties to a cause*, the 15th Order provides “that every person *not being a party in any cause*, who has obtained an order, or in whose favour an order shall have been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause; and every person *not being a party in any cause*, against whom obedience to any order of the court may be enforced, shall be liable to the same

process for enforcing obedience to such order as if he were a party to the cause.

The process by attachment, sequestration, and the sergeant-at-arms, is the same for enforcing obedience to an order, as for enforcing appearance or answer, *mutatis mutandis*; and as to the process by attachment and of obtaining and working a writ of sequestration, and as to obtaining an order for the sergeant-at-arms, see *ante*, pp. 7 and 24; and in a subsequent section, in which more will be said of process of contempt generally.

The proceedings to enforce obedience to an order or decree under the Orders of 1839, are confined to orders for the payment of *any sum of money or any costs*,

The 1st of these Orders prescribes that "every person to whom in *any cause or matter* pending in this court, any sum of money or any costs have been ordered to be paid, shall, after the lapse of one month from the time when such order for payment was duly passed and entered, be entitled by his clerk in court to sue out one or more writ or writs of *fieri facias* or writ or writs of *elegit* of the form hereinafter stated, or as near thereto as the circumstances of the case may require: (for the forms of the writs see the Order of the 10th May, 1839, and Beav. Orders, p. 138.) ⁽¹⁾

The writs when sealed, are to be delivered to the sheriff, and executed by him, and when returned, are filed at the Writ and Record Clerks' Office

If on the return of any such writ of *fi. fa.* it appears that the officer has *seized* but not *sold* the goods of the party liable, the party to whom the money is payable may sue out a writ of *venditioni exponas*: (see the form of the writs in the General Order of May 10, 1839, and Beav. Ord., p. 154.)

A sequestrator is the officer of the court, and his position is analagous to that of the sheriff seizing under a judgment at common law. Consequently, his complete right does not take effect till actual execution of the writ, that is, actual taking possession, and if between the time of delivery of the commission and execution, a judgment creditor at law takes possession, his right will prevail: (see in *Angel v. Smith*, 9 Ves. 336.)

Sequestrators, as officers of the court, are entitled to all the protection, and subject to the liabilities, of officers of the court.

⁽¹⁾ It will be recollected that, in such matters, the solicitors of the parties are substituted for the clerks in court by the 16th Order of October, 1842.

It is a contempt to disturb their possession, however wrongful the order for the sequestration may be shown to be; and if the party against whom sequestration has issued, disputes the validity of the title of the sequestration, his course is not to disturb their possession, but to apply to the court: (see *Empringham v. Short*, 3 Hare, 461; and *Hawkins v. Gathercole*, 1 Drew. 12.) The usual course is to apply by motion for leave to bring ejectment, or to be examined *pro interesse suo* in the lands or goods sequestered.

The old examination *pro interesse suo* was conducted in interrogatories before the examiner, and the process was, as usual under the old system, somewhat complex. The order now directs that the party may be at liberty to come in before the judge at chambers to be examined. I am not aware of any case under this head of the new practice. But referring to the general practice of inquiries directed before the judge in chambers, it is presumed the practice will be that the party so coming in will proceed by bringing in an affidavit, on which he will be cross-examined, and re-examined *vivâ voce* before the judge's chief clerk, who will thereupon make his certificate in the usual course, and such certificate will be open to objection before the judge, and to appeal, in the same way as any other certificate. If the court is satisfied that the estate or goods sequestered ought not to be so wholly or partially, it will discharge the writ of sequestration, or make such order restricting wholly or partially the execution of the writ, as it shall think fit.

Sequestrators, also, like other officers of the court, are liable to the authority of the court for any excess or irregular exercise of their authority. But here there is this distinction as to the right and course of conduct of the party affected by their acts. If the thing complained of is the illegality or irregularity of the *order for sequestration*, that is, the title of the officer, it is a contempt to dispossess, or disturb, or resist the sequestrator, with which the court *must* interfere, because he is acting under the order of the court, which must be obeyed until discharged. But if the irregularity is in the personal conduct of the officer, then, although it is a contempt to resist or disturb him, yet because his authority is limited by the order, and if he goes beyond it he is *pro tanto* not an officer of the court, it is one of which the court is not bound to take notice, though it has power to do so: (see Drew. on Inj., p. 127, *et seq.*, and the cases cited.) The authorities seem, on the whole, to show that it is not prudent to question either the title of the officer of the court, or the regularity of his execution, except by application to the court.

CHAPTER II.

I. *Of carrying a decree into execution.*

When the cause has arrived at the making and completion of the decree, in a great variety of cases, it disappears for some time from the court, while the decree is being worked out in the judge's chambers. I shall first discuss this class of cases.

When a decree or decretal order directs accounts or inquiries, the first step to be taken is for the solicitor prosecuting the decree, to leave a copy of it at the judge's chambers, which he must certify to be a true copy of the decree or order as passed and entered: (17th Order, October, 1852.)

Upon leaving a copy of the order, he takes out a summons to proceed with the accounts or inquiries directed, and on the hearing of such summons, the judge gives directions as to the manner in which the accounts and inquiries are to be prosecuted, the evidence to be adduced, the parties who are to attend, &c. : (18th of the same Orders.) In practice all this is done in the first instance before the judge's chief clerk, who directs by whom and within what time the accounts are to be brought in.

The plaintiff serves that order upon the accounting party, who must bring in his account within the time limited; if he requires further time, he takes out a summons for time, and in a hostile case, he must support his application by affidavits showing satisfactory reasons why he cannot bring in his account within the time fixed. It is scarcely necessary to say that mere grounds of personal convenience are not sufficient; substantial difficulty in making out the accounts, as from their length, the incapacity or substantial difficulty, occasioning delay, in procuring the necessary books or information, illness, or other personal incapacity, or the like, will be requisite. If the accounting party, not obtaining further time, persists in disobeying the order, the plaintiff's solicitor obtains a peremptory order from the chief clerk, which he has regularly drawn up, and then the party dis-

obeying the order is liable to process of attachment under the 11th Order of 1841, above cited.

The defendant obeying the order, takes in an account verified by affidavit; the account, when the decree is in the common form, is simply a debtor and creditor account, stating the payments on one side, and the receipts on the other; and the affidavit verifying that the accounting party has made all such payments, and that he has not, by himself or by any person for his use, received any further or other sums than those stated; the items on each side of the accounts are to be numbered. The affidavit refers to the account as an exhibit, and both are left in the judge's chambers.

If the plaintiff seeks to charge the accounting party with more than he has admitted, he gives him notice under the 30th Order of the 16th October, 1852, stating, so far as he is able, with what further he seeks to charge him, and the particulars thereof, in a short and succinct manner, and takes out a summons to hear the matter, which is then disposed of by the chief clerk.

In taking such an account under the common decree, the accounting party must prove by vouchers all his payments as to all sums above 40s.; as to sums under that, his affidavit, if explicit, is sufficient. But under special circumstances the court will, under the 15 & 16 Viet. c. 86, s. 54, give special directions with respect to the mode in which the account is to be taken and vouched either by the decree or by any subsequent order; and may direct that the account books of the accounting parties shall be taken as *primâ facie* evidence of the truth of the matters therein contained. (As to the extent to which, and the circumstances under which, the court will exercise this jurisdiction, see *Ewart v. Williams*, 3 Drew. 21.) It is not usual for any such direction to be given in the decree in the first instance, but the judge will either on application give such direction in chambers, or will hear the matter in court: (see *Attorney General v. Attwood*, 9 Hare, App. 56; and *Ewart v. Williams*, *suprà*.)

And generally, if it appears to the judge after decree, that it would be expedient that further accounts should be taken or further inquiries made, he may order the same to be taken or made accordingly; or, if desired by any party, may direct the same to be considered in open court: (20th Order, 16th October, 1852.)

It has been held (though decision seemed scarcely requisite on such a point) that the chief clerk has no authority to give such a direction (*Newbury v. Benson*, 23 L. J. 1003), seeing that the act only gives power to *the court*, and

bearing in mind, moreover, that, as already observed (*ante*, p. 22), the chief clerk really never makes any order at all, but every direction of the chief clerk derives its force from its being signed by and becoming the order or direction of the judge. This should always be borne in mind as being the principle of the chief clerk's jurisdiction, though, of course, in practice multitudes of orders or directions of the chief clerk are acted upon without being regularly made orders, where they would be made orders as, or almost as, of course. The affidavit and vouchers of the accounting party only vouch the fact of payment; the propriety of payment is another question, which may be disputed by the party taking the account.

When the accounts have been fully rendered, and any questions upon the propriety of payment by the accounting party have been allowed or disallowed, the chief clerk makes his certificate accordingly. The general form of the certificate is regulated by the 46th Order of 16th October, 1852, and schedule E. thereto; and the chief clerk states in it what sums in dispute he has allowed and disallowed, and sometimes the grounds of allowance and disallowance. If on any of these questions the party aggrieved desires to have the opinion of the court, he takes out a summons to take the opinion of the judge in chambers, within four clear days after the certificate has been signed by the chief clerk: (47th Order, October, 1852.) And this is termed an adjourned summons, of which a list is made to be disposed of by the judge when he sits in chambers. Many of these summonses are by the judge adjourned to the court, of whose business they now form a considerable part, and usually in each court a particular day in each week is applied during the sittings to dispose of adjourned summonses.

If no party within the four days takes out a summons to have what is in effect an appeal to the judge on the chief clerk's certificate, or a re-hearing of the matter or part of the matter of it, at the expiration of the four days the judge signs it in the following form:—"Approved this day of ;" and signs it, and then, and not till then, it becomes the order of the judge.

I have observed in former passages, that from the chief clerk's certificate the appeal lies to the judge of the court in the first instance, if he has only signed *pro formâ* without having himself heard the matter upon objections, and to the Court of Appeal direct, if the matter has been heard and substantially decided by the judge himself. On this point there seems to be some slight dif-

ference in form between the practice of the Rolls Court, and that laid down by Vice Chancellor Kindersley in *Saunders v. Druce*, 3 Drew. 139, though, in substance, the practice seems uniform. The practice of the Master of the Rolls when he has heard personally and decided in chambers the matter of the certificate, and thereupon signed it, is to require a motion to vary to be made in court, whereupon he makes an order without hearing argument in court, affirming the decision in chambers, to enable the parties to appeal: (*York and North Midland Railway Company v. Hudson*, 18 Beav. 70; see p. 73.) It is submitted that, upon principle, the course pointed out by Vice Chancellor Kindersley is the correct one, inasmuch as the judge is the judge wherever he sits, and his order upon hearing a case is of the same force whether made in chambers or in court. Therefore, if upon hearing objections in chambers he decides questions and makes the certificate which is then his order accordingly, and then re-hears it in court, even although he should do so *pro formâ*, there will have been already one re-hearing in the nature of an appeal, so that the party could or might be deprived of his right to appeal to the Lords Justices. However, in *Rhodes v. Ibbetson*, 2 Eq. Rep. 77, the course taken was this: the case was on objections to title, and the Master of the Rolls heard and decided the objections in court; then the chief clerk's certificate was signed *pro formâ* by the Master of the Rolls; then the defendant appeared *pro formâ* at chambers to vary it, and the Master of the Rolls without argument refused the motion; thereupon an appeal motion to discharge the order was carried to the Lords Justices, which they heard and disposed of.

The mode of taking evidence in chambers is regulated by the 15 & 16 Vict. c. 80, ss. 30, 31, and the 26th and 27th Gen. Ord. of October, 1852, and by the general practice.

And first, in proceeding under a decree, all evidence read or entered as read at the hearing of the cause, may be used by either party before the judge or the chief clerk in chambers. Also, further evidence may be brought in support of or against claims made under the decree, by affidavit, or, when directed by the judge, on interrogatories, or *vivâ voce*; and when a chief clerk is directed by the judge to examine any witness, the practice and mode of proceeding is to be the same as in the case of the examination of witnesses before the examiner, subject to any special directions: (26th Order, October, 1852.)

If either party brings in affidavits, any of the other parties may cross-examine *vivâ voce* the witnesses making the affi-

davits, and then the party bringing in the affidavits may re-examine. The examination is usually conducted before the chief clerk, and then, as observed in a previous section, Chapter I., the parties are not allowed to attend by counsel. If they desire so to do, they must apply that the examination be taken before the judge in person, and such an application will not, in general, be refused. But, in costs, no fees for the attendance of counsel in chambers will be allowed, unless the judge certifies that it is a proper case for counsel to attend; and it is by no means of course for the judge to give such certificate.

Affidavits intended to be used in the judge's chambers must be filed in the Record and Writ Clerk's Office, and office copies of them taken as on a motion in open court. The party intending to use any affidavit, must also give notice to the other parties of his intention: (24th Order, October, 1842.) And so, if any party intends to call and examine or to cross-examine a witness *vivá voce*, he must give at least forty-eight hours notice to the other parties of his intention, pursuant to the 36th Order of August, 1842; and see *ante*, Section X., Chapter I.

To procure the attendance of a witness or of a party to be examined as a witness, the solicitor for the party desiring his attendance takes out a summons directing him to attend at the time therein mentioned, and serves the summons personally on the person to be examined; and if he does not attend he is liable to process of contempt, in like manner as a party or witness before the 15 & 16 Vict. c. 86, s. 31, was liable in default of attendance pursuant to a *subpœna duces tecum*. As to a witness attending but refusing to answer before the chief clerk, this course of practice was laid down in *Haywood v. Haywood*, 1 Kay, App. 31, that the party examining thereupon applies to the judge to examine the witness in person, which the judge will do; and then, if the witness persists, the judge can instantly commit him if he thinks fit.

The judge's chief clerk usually fixes at some period of the inquiry a time for closing the evidence, either of his own accord, or on the application by summons of either party. When that time is about to arrive, any party not being prepared to close his evidence, and requiring further time, takes out a summons for further time, and supports his application by evidence, usually by affidavit, and the chief clerk will extend or refuse to extend the time at his discretion, subject, however, like every other decision of the chief clerk, to the decision of the judge on an applica-

tion by way of appeal. Oral evidence is taken down by the chief clerk in the same manner as by one of the examiners of the court with his own hand, in the form of depositions, and not by way of question and answer; and he has just the same powers in respect to the evidence, as the examiner, and no more: (see 15 & 16 Vict. c. 86, s. 32, and 26th Order, October, 1852.)

When the evidence is closed, that is, when all parties have fully exhausted their evidence, or the time has arrived beyond which neither the chief clerk nor the judge will allow any more evidence to be taken, the depositions and other evidence are signed by the chief clerk, and transmitted by him to the Writ and Record Clerk's Office, where they are filed, and then any party may have a copy of the whole or part thereof.

Upon the prosecution of a decree, if documents in the power of the accounting party have not been already produced, either pursuant to a summons, or upon a motion made in court upon the answers, their production becomes generally necessary after the decree: or, if documents have been so produced, it may occur that further production is requisite. In either case production of documents may be obtained upon summons in chambers after as well as before decree (3rd Order of 1st June, 1854), the party bringing them in being bound to do so with an affidavit in the form referred to *ante*, p. 32. This portion of the subject has been fully treated in Section VII., and need not be repeated here.

When a decree or order directs inquiries as to the state of a family, as for instance, whether the testator had any and what children, and which of them survived him; and whether any of them are dead, leaving any and what issue; and who were the next-of-kin of A. living at his death, and if any of them are dead who are their personal representatives, or the like; inquiries which are most frequently combined in a decree with directions for taking accounts, but are sometimes the sole subject of inquiry; the preliminary course as to leaving a copy of the decree in the judge's chambers, and taking out a summons to proceed with the inquiries, is the same as already pointed out in reference to a decree for an account.

In prosecuting the inquiries, advertisements are inserted under the direction of the chief clerk, for the next-of-kin or the heir-at-law as the case may be respectively. And any person who believes himself to fill the character inquired for, may come in and make his claim, by bringing in a short

statement of his claim, and how he makes it out. And this statement must of course be supported by the usual evidence of births, deaths, marriages, relationship, and in fact all the incidents of pedigree.

It may here be observed that, generally, nothing like the statements of facts, charges and discharges that used to be required in the Master's offices, are used in chambers. The course is, in support of any claim to take in a concise statement of the case on which the claim is made, with the original documents relied on, if they can be obtained, or, if not, copies, abstracts, or extracts from them: (see 23rd Order, October, 1852.)

When an order is made directing an account of debts, claims, or liabilities, or an inquiry for next-of-kin, or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement, are to be excluded from the benefit of the order (9th Order, Oct. 1852), unless on the day appointed for hearing claims under advertisements, they are not disposed of, and they are adjourned to a future fixed day, under the 38th of the same Orders: and then any claimant who has not entered his claim may be heard on such adjournment day, provided he enters his claim and files his affidavit four clear days prior to such day, and no certificate of debts or claims shall in the mean time have been made: (39th of same Orders.)

When advertisements are required for any purpose, now a peremptory and only one is to be issued, unless for any special reason it may be thought necessary to issue a second advertisement or further advertisements; and any advertisement may be repeated as many times and in such papers as may be directed. It is prepared by the solicitor, and to be approved by the chief clerk, and signed by him. The advertisements for creditors and debtors must fix a time for them to come in and prove, and appoint a day for hearing and adjudicating on their claims; and claimants coming in pursuant to advertisement are to enter their claims at the chambers of the judge in the Summons and Appointment Books for the day appointed for hearing, and are to give notice thereof, and of the affidavit filed, to the solicitors in the cause, within the time specified in the advertisement for bringing in claims: (see 33rd to 36th of the Orders of October, 1841.)

With regard to persons claiming as creditors, those whose debts are under five pounds need not attend at the day of hearing, unless required to do so by notice from some party

(40th Order, October, 1852): and claimants filing affidavits need not take office copies, but the party prosecuting the decree takes office copies, and in practice he furnishes the other parties with copies at their own expense: (37th Order.)

Interest is computed, as of course, upon debts carrying interest at the rate which they carry, and on debts not carrying interest at four per cent. from the date of the decree: (10th Order, Oct. 1852.) The plaintiff of course, or if he is not prosecuting the decree, the party who is doing so, is entitled to attend on all claims.

Upon the mode of proof of claims some observations may be useful, although of course in this, if the claims are disputed, the solicitor conducting the matter must use his discretion, acting upon the general principles and practice of evidence, of which I have treated in Section X., Chapter I.

No charge need be brought in, as already observed in reference to the 23rd Order of October, 1852, but creditors bring in their claims either in writing or *vivâ voce*, and support them by evidence, either by affidavits or by documents, as the case may be. A mortgage debt, for instance, will be proved by production of the deed, and an affidavit verifying its execution and the amount remaining due, stating, however, not merely as a gross sum what is claimed, but shortly an account of what has been received, and what remains due, separating principal and interest. A debt on a bill or note will be proved by producing the bill or note, with an affidavit verifying the consideration, and the nonpayment.

A judgment debt will be proved by production of a verified copy of the judgment, and an affidavit verifying the recovery of the judgment, and for what, and that the amount claimed remains due.

A simple contract debt will be proved by an affidavit verifying the cause of debt, as for instance, for work and labour done, and the amount, if any, paid, and the amount remaining due.

It would be a waste of space to attempt to go into more detail on such matters, as in each case the proof must be according to the circumstances. The form of affidavit is not material, provided it clearly and with sufficient facts establishes that there was a debt, the ground of the debt, and the fact of there being a residue remaining unpaid.

Of course the party claiming must also show that he is the person entitled to be paid. Therefore, if he is claiming in a representative character, as an executor, or heir, or

trustee, or assignee in bankruptcy or insolvency, or by deed, he must produce the usual *proof* of his filling the particular character.

A preliminary decree for accounts and inquiries frequently directs a sale of real estate. This is conducted in the judge's chambers.

The first thing to be done by the solicitor conducting the prosecution of the decree, is to prepare an advertisement which, when prepared, must receive the sanction and signature of the chief clerk. It is then taken to the office of the *London Gazette*, and inserted; and usually copies are inserted in some leading London paper, and in provincial papers also, if the sale is of property in the country.

The plaintiff usually has the conduct of the sale, whether he is really the party to make a title or not, but the judge may otherwise direct.

After the advertisements have been prepared and issued, the next step is to prepare conditions of sale, which is done by the plaintiff or other party conducting the sale, and they must be settled and approved by the chief clerk.

For the preparation of the conditions, I assume that the reader is acquainted with the general framing of conditions of sale; and conditions of sale under a decree differ from ordinary conditions only in expressing on the face of them that the property is sold under a decree of the Court of Chancery, and in taking care to reduce as much as is practicable the number of lots, as each lot throws its share of expense on the estate under administration.

The judge, or the judge's chief clerk, may fix reserved biddings and the amount of deposit, and appoint a person to receive the deposits, and also to receive proposals by private contract.

In a private sale it is often prudent, but in a sale under a decree it is compulsory, before putting up for sale the property ordered to be sold, to lay the abstract of the title before one of the conveying counsel of the court, to advise thereon generally, and especially in respect to whether any and what special conditions are requisite (15 & 16 Vict. c. 86. sect. 56), unless the judge otherwise directs.

When these things have been done, and the conditions settled, a sufficient number of copies of the particulars and conditions are procured to be printed by the party conducting the sale, and copies given to all the parties in the suit. A person is then to be appointed by the chief clerk to conduct the sale, and the chief clerk at the same time will deliver to the solicitor printed directions for

the person conducting the sale as to the manner in which he is to conduct it.

The biddings are verified by the person conducting the sale, by an affidavit, the form of which is delivered with the direction from the judge's chambers to the solicitor.

And when the biddings so verified are returned to the chief clerk he thereupon will make his certificate of the sale.

Biddings are not at once conclusive; any person who within eight days after the signing by the judge of the chief clerk's certificate is willing to make an advance upon the bidding, may apply by motion to the court upon the usual notice to the parties in the cause, and on the bidder, to open the bidding; that is, to become substituted as a purchaser for the original bidder; and if he makes such an advance as the court thinks sufficient, he will be admitted as such new purchaser, paying of course the costs of the original purchaser. The costs of the motion of the other parties, will be costs in the cause.

There is no general rule as to what is a sufficient advance, but rarely less than ten per cent. will be accepted. However, the principle is that on such motions the court considers itself as the auctioneer of the estate, and will get as much as it can.

Whoever is the purchaser, when the certificate of sale is finally signed, will then, and not before, investigate the abstract of title. If he is satisfied with it, he applies by summons in chambers, on notice to the solicitor conducting the sale, and on no other parties, for leave to pay in his purchase money; and if there be interest, the interest also, by a given day, and to be from that day let into possession.

The proper order thereupon is, that the purchaser do pay in such purchase money and interest by such day, the account to be verified by affidavit, and that the same be laid out in the purchase of Three per Cent. Annuities.

This order is carried out by the purchaser's solicitor, by obtaining from the Accountant General's Office the usual directions, and paying in the money at the Bank; and when that is done, the vendor's solicitor attends at the Accountant General's Office to direct the investment, which is accordingly made. The purchaser then prepares his conveyance, which is to be settled by the chief clerk, if the parties differ about the same. For that purpose it is usually referred to one of the conveyancing counsel of the court, but it may be settled before the judge himself in chambers. As to the costs of such proceeding, it is presumed that they will follow the issue of the matter; that is, if the judge or the conveyancing counsel agrees to and adopts the matters insisted on by the

vendor, the purchaser will pay the costs; if the deed is settled as proposed by the purchaser, the vendor will pay the purchaser his costs, and have them over against the estate, if his objections were reasonable; and if some of the objections prevail, and others do not, then each party will pay his own costs. But there is not, as I am aware, any fixed rule, and the matter will be in the discretion of the judge.

If a purchaser does not himself apply within the proper time, that is, within eight days from the signing of the certificate of sale, to pay in his purchase-money, the vendor's solicitor takes out a summons for an order that he may pay in his purchase-money on or before a day named. If the purchaser objects to the title, he appears on this summons, and obtains a reference of the title; and he is then directed to bring his objections into chambers in writing, within a given time. When they are brought in, they are usually laid before one of the conveyancing counsel of the court, with the abstracts, and he furnishes his opinion upon them, and the chief clerk usually makes his certificate accordingly. But if a party objects, he takes out a summons to argue the objections before the judge in chambers, and the judge either decides the questions in chambers, or sometimes adjourns the case to be heard in court. When he has decided, he makes his certificate accordingly, and if it is in favour of the title, then, at the expiration of eight days from the signing of such certificate, the vendor's solicitor, if the purchaser has not moved to pay in his purchase-money in the mean time, takes out a summons for an order that he do pay in his purchase-money. Of course an appeal lies by motion on notice to the Lords Justices from the judge's certificate.

If the judge's certificate is against the title, and there is no appeal, the purchaser applies by summons to be discharged, and he will be entitled to be so, with all his costs, charges, and expenses incurred in the purchase.

If the purchaser, not having obtained a reference of title, or having been defeated upon his objections and not having appealed, neglects to obey the order to pay in his purchase-money, he is proceeded against by process of contempt, as if he were a party to the suit, under the 15th Order of 1841. When a purchaser conceives himself entitled under the conditions of sale to compensation, although he is satisfied with the title, he may either stand upon that objection on appearing to the summons to pay in his purchase-money, and then that matter will be adjudicated upon by the chief clerk, subject of course to the revision of the judge; or the purchaser may,

before waiting to be called upon to pay his purchase money, himself initiate the question of compensation, and take out a summons to apply for compensation, and then the question is disposed of in like manner.

The usual rule hitherto has been, that if a title is doubtful, though not clearly defective, the court will not force it upon a purchaser; but I am informed that, in a very recent case at the Rolls, not yet reported, the Master of the Rolls held that the court will not take any such distinction, but will decide aye or no whether the purchaser must take the title. The investigation of such questions belongs, however, rather to the subject of jurisdiction than of practice, and would be out of place here.

Of the proceedings in the appointment of a Receiver.

When the court has directed the appointment of a receiver, either by decree or upon a motion before decree (see *ante*, p. 90), the party obtaining the order carries into chambers a short proposal in writing of a person to be such receiver, and of two other persons for his sureties; and stating also shortly the nature, extent, and income of, and charges upon the property. The proposal is accompanied by an affidavit verifying the material facts. All the parties must be served with the summons taken out for this purpose, and any party is at liberty to propose another person for receiver, and the matter will be then disposed of. Any person may be a receiver except a peer, a party to the cause, a barrister or solicitor engaged in it, or any person being a trustee for any party to the cause. But, except a peer who cannot be at all a receiver, any of the excepted persons may be receivers, by consent but without salary.

A receiver must take possession of the estate, and the tenants are bound to attorn to him. If they refuse, the plaintiff, or, if he will not, the receiver, applies by motion, on notice, that they be ordered to attorn or to stand committed, and the court will make such order, which will then be enforceable, if disobeyed, by the usual process of contempt; and the tenants must pay their rents to the receiver. If there are rents in arrear which are not obtained, an application should be made, by motion, for liberty for the receiver to distrain. In general, indeed, the receiver ought not to apply to the court himself, but should procure the plaintiff or other party interested to do so. The receiver accounts annually for what he pays and receives. A receiver ought not to pay anything without the order of the court. He

may let the estate, and may manage as well as set and let; but all this must be done with the approbation of the judge in chambers, and the course is for the receiver to bring in at once, and without special order, before the chief clerk, any proposals for letting or managing.

I have stated that a receiver ought not to pay money without the direction of the court; this is the general and strict rule; of course in practice it is not convenient that it should be minutely adhered to. Thus, a receiver may pay or allow for small and customary repairs, though he cannot, if they are extensive, without the sanction of the judge in chambers. Still, if he lays out money for even considerable repairs, or for other proper purposes, he may be allowed them, if the judge, upon inquiry, thinks they were proper. In *Attorney General v. Vigor* (11 Ves. 563), the Lord Chancellor said, the court is not in the habit of permitting receivers to apply the trust fund in repairs to *any considerable extent*, without a previous application, but directed an inquiry to the Master, on the application of the receivers to be allowed for repairs done, whether the repairs were reasonable.

It is probable that, now that the direction of the court may be taken so speedily and cheaply on an application in chambers, the rule will be more strictly adhered to than formerly, and a receiver should not be advised to incur any but very trifling liabilities out of the estate, without the sanction of the judge.

The direction as to the bringing in and passing his accounts, is made now by the judge in chambers on the final appointment of the receiver; and he may, in accordance with the 63rd Order of 1828, then or at any subsequent time, in the place of annual periods for the delivery of the receiver's accounts and payment of his balances, fix a longer or a shorter period at his discretion, and when such other periods are fixed by the Master, the regulations and principles of the Order of 23rd April, 1796, shall be in all other respects applied to the receiver.

The receiver's accounts are brought in in a very simple form; they are headed in the cause, and contain in separate columns the names of the tenants, the description of the premises, the rents, arrears due, the current rent due, the rents received, and any observations.

There should be also an account of the disbursements, including the receiver's poundage, and the costs of passing his accounts. The account is verified by affidavit.

These accounts are passed before the chief clerk; a fair copy is left, and a summons to proceed is taken out, and is

served on the solicitors of the parties to the suit interested : (31st and 32nd Orders of October, 1852.) When the account has been gone through and a balance struck, the account is entered by the solicitor of the receiver in a book called the Receiver's Book, and in a duplicate book kept by the receiver : (31st Order, October, 1852.) The book containing the account verified is returned to the judge's chambers, and the chief clerk issues his certificate, stating the amount due from the receiver and when he is to pay it in ; the certificate is filed, and is then forthwith to be acted upon : (53rd Order, October, 1852.) The course of proceeding for paying in the money is the same as that already pointed out for paying in purchase money, viz., the solicitor of the receiver takes an office copy of the certificate to the Accountant General's Office, where the usual direction to pay in is obtained, and that is to be taken to the Bank, and the money paid. The mode of compelling a receiver to bring in his account and pay in his balance is by application in chambers for an order that he do bring it in within four days or stand committed.

If, when the certificate has been issued directing him to pay in his balance, he neglects to do so, the course is to apply in chambers for an order that he do so within a given time ; and if, being served personally with this order, he disobeys it, he may be proceeded against by the usual process of attachment and its consequences, of which I have already treated.

If a receiver does not bring in his account, or does not pay in his balance pursuant to the chief clerk's certificate, his sureties become liable ; but they cannot be proceeded against until the receiver has been put in contempt, unless the receiver has become bankrupt or insolvent. The sureties are proceeded against by petition, or motion, on notice, for leave to put their recognizances in suit against them, and as the recognizances are now given to the Master of the Rolls or the senior Vice Chancellor, the order gives the party moving or petitioning liberty to use the name of the Master of the Rolls or the Vice Chancellor, as the case may be, in order to put the recognizances in suit against the sureties. When a receiver has passed his final account, and paid in his balance, his recognizances are vacated in order to discharge his sureties. The order for this is obtained on a summons at chambers. The order must be regularly entered and drawn up, and when drawn up must be marked by the secretary of the Master of the Rolls, and is then enrolled in the Enrolment Office.

II. *The Master's Report and exceptions thereto.*

I shall not treat with any degree of detail of the mode of proceeding to obtain the direction of the court, either by way of overruling or in furtherance of a report made by the Master, where, in an old suit, the reference for accounts and inquiries has been to one of the Masters instead of to the judge in chambers, as proceedings before the Master are becoming rapidly exhausted in old suits, and under the 15 & 16 Vict. c. 80, will soon cease to be known in the practice of the court. For the details, therefore, of their proceedings I must refer to the well-known works on the old practice of the Court of Chancery; but it will not be wholly useless shortly to point out what those proceedings were, in order to show more clearly the distinction between them and the proceedings now taken upon the judge's certificate in chambers, which corresponds in effect and substance to the Master's report under the old practice.

When the Master, being directed to make inquiries or to take accounts, had done so, he made his report referring to the states of facts brought before him, and to the evidence brought in in support of them, and he reported, in the form of a finding, those facts and circumstances which were the result of the evidence, and sometimes, by way of fact, the conclusions which he drew from all the matters before him. The Master's finding or report was conclusive on the parties, at least as to all findings of fact, if not objected to; and, after being duly confirmed, was acted upon by the court as conclusive on hearing the cause on further directions. If any party was dissatisfied with the Master's report, he might bring his objections to it before the court, by filing exceptions. As a foundation for the exceptions, it was, however, necessary, as a preliminary step, to carry in *objections* before the Master, before he had finally signed his report; the objections and the exceptions were in reality exactly and literally the same, but the theory was that the Master would rehear the case, on which he had already decided, upon the objections, so that he might, in fact, vary his decision upon his draught report, before it was finally settled and signed; but, in practice, the Master never, or very rarely, did in fact hear the case re-argued, and rarely, if ever, was attended upon the objections, except as a mere matter of form. The objections were usually carried in *pro formâ* only, and as a matter of course disallowed. They were, therefore, altogether a useless and superfluous pro-

ceeding. As to the substance of the exceptions, they might be to the finding of the Master, either that upon the evidence before him it was wrong, or that he had admitted improper evidence, or that he had rejected proper evidence; but it was absolutely necessary that they should point out specifically the parts of his finding objected to, and then they usually suggested what in the view of the exceptant the Master ought to have found; so far as the exceptions did not cover any part of the Master's report, it remained conclusive. When the exceptions had been filed, they were set down to be heard (on a petition of course in the same manner as a cause), and were argued and disposed of in court. If the exceptions were altogether overruled, the effect was that the finding of the Master was established, and his report would then be confirmed as a matter of course, and the cause would then be set down to be heard on further directions; that is, to have those questions and matters decided by the court, which could not be decided until the information furnished by the Master's answers to the inquiries sent to him had been procured. If any of the exceptions were allowed, the effect might be simply to adopt the proposition tendered by it; but the court was frequently obliged, on allowing exceptions, to refer it back to the Master to make a further report. Now, the process is quite different; the certificate made by the chief clerk is conclusive, if unobjected to within eight days after it has been signed by the judge, as fully as was a Master's report absolutely confirmed. If any party objects to it, his course is, when the chief clerk has made it, either to apply to the judge himself within (four) days to hear it himself personally in chambers; and the judge will either so rehear it, or adjourn it, as an adjourned summons, to be heard in court, and the certificate then made by the judge will be conclusive, unless appealed from: if objected to, it must be before the Lords Justices. The appeal to the Lords Justices is made by motion on notice to discharge or vary the certificate; or, if the judge has signed the certificate *pro forma*, any party objecting to it may do so by taking out a summons by way of appeal, within eight days from such signing before the judge in chambers, to discharge or vary the certificate; such summonses are almost always adjourned to the court. But, in either case, no formal objections or exceptions analogous to those in the Master's office are requisite; but the proceeding, whether in chambers or in court, is in the nature of a motion to vary or discharge the certificate, and any objections may be taken to it upon the materials on which it is founded, or which

were brought into the judge's chambers, as nearly as may be in the same manner as under the ordinary practice of a motion to discharge any order of the court, capable of being discharged or varied on motion.

When the certificate is not objected to, or, having been objected to, is finally settled by the judge or upon appeal, the cause is then ripe to be heard upon what is now termed *further consideration*, instead of *further directions*, and the cause must be set down again to have those matters disposed of which arise upon the facts certified, or the conclusions decided upon the face of the certificate.

The cause may, upon the expiration of the eight days from the filing of the certificate, and within fourteen days from that date, be set down on the written request of the solicitor of the party having the conduct of the decree, and, after the fourteen days, at the request of the solicitor of any party to the cause. The form of the request is given in the Orders of March, 1853.

The cause, when set down, is not put in the paper of causes for further consideration till ten days after the day on which it was set down; and notice must be given to the parties in the cause of its being set down at least six days before it is marked in the cause book for further consideration. The form of that notice is given in the Orders of March, 1853.

This notice should be served on the solicitors of the parties and an affidavit of the service made and filed to be used in court, if necessary, when the cause is called on, on further considerations, for the same reasons that have been pointed out in reference to the proof of having served subpœna to hear judgment, when the cause was set down to be originally heard.

On the hearing of a cause on further consideration, the brief will consist, as regards all the parties, of the original brief held on the original hearing of the cause; and, in addition, of the certificate. The court will proceed only on the facts found by the certificate, as, formerly, it would proceed only as to facts upon the Master's report; that is, no evidence can be looked at to contradict or vary the facts certified by the certificate. But if on the face of the certificate the facts found are not sufficient to enable the court to decide, it will direct further inquiries in chambers, and postpone the further consideration. The hearing of the cause is conducted much in the same way as the original hearing: the plaintiff's leading counsel opens the case, and refers to so much of the original papers, of the original decree, and

of the certificate, as he thinks necessary, and then argues the questions of law arising thereon; he is followed by his junior in the same course, and then the counsel of the defendants proceed in the order in which their clients stand upon the record; and the plaintiff's senior counsel replies.

I have observed that no evidence will be admitted on further consideration, beyond the certificate itself. There is, however, this exception, that under the 13 & 14 Vict. c. 35, proof may be made by affidavit that all proper parties are before the court, and of all such matters as are necessary to be proved for enabling the court to order payment of any moneys belonging to any married woman, and of all such other matters not directly in issue in the cause as in the opinion of the court may safely and properly be so proved. It was not usual in general, under the old practice, to furnish counsel with the schedules to the Master's report, nor is it the usual practice now to furnish them with the schedule or accounts referred to in the certificate; and in cases where the questions to be determined on further consideration are purely questions of law, as to which it is immaterial what deductions can be drawn from the figures, it is not necessary; but when, as in many cases, the questions are of mixed law and computation, the accounts referred to should always form part of counsel's brief. The embarrassment produced on the hearing of a cause by these matters being then for the first time placed, if it is requisite to refer to them, in counsel's hands, is sometimes excessive and highly prejudicial to the interests of the parties.

In some classes of cases the finding of the certificate, as was formerly the case with the Master's report, though in terms a finding of facts, may in truth be a finding as to the whole question, and shut out further consideration of the question of law. Thus, in the case of *Gregory v. Smith* (9 Hare, p. 708), the testator gave his property subject to a life estate to "the families of Gregory and Gear." The original decree referred it, among other things, to the Master, to ascertain who the testator intended by the families of Gregory and Gear, and the Master found that the testator had known certain persons of that name, and who were their descendants, and he found that the testator intended certain defendants by the description of Gregory and Gear. The court, with great difficulty, permitted the next-of-kin to contend that the will was void for uncertainty, inclining strongly to hold that the Master's report was conclusive in favour of those persons, and that only questions of their rights *inter se* could be argued. In all such cases great care should be

taken by the solicitor of the parties interested to obtain the certificate to be so worded, as to submit plainly the questions of law to the court on the face of the certificate ; and, if they cannot succeed in procuring it to be so worded, to take the opinion of the judge upon it personally in due time, so as not to conclude him by the certificate at the hearing on further consideration.

It is quite clear that when an original decree has been appealed from and varied by the court above, and then comes on, on further consideration, the further consideration is to be heard by the court below, before whom the cause originally was, and not by the Court of Appeal : (*Flight v. Marriott*, 12 Jur. 487.) It is, indeed, strange that the point should ever have been doubted or misunderstood, bearing in mind that the principle of a variation of a decree on appeal is, that the Court of Appeal makes such decree as the court below ought to have made, and that, when so varied, it is the decree of the court below, and not of the Court of Appeal.

A question of great moment frequently arises, on further consideration, with reference to the species of decree that may be made against executors and other persons in a fiduciary character ; and a regard to the rules on this subject is, therefore, very necessary to be had in settling the original decree. If the original decree directs simply an account of what has come to the hands of trustees, and does not go on to direct an inquiry as to what they might have received but for their wilful default, the court will not, on further consideration, charge them with, or direct a further inquiry as to, wilful default. The court assumes, either that the point was not raised by the plaintiff on the original hearing, and therefore he has concluded himself from raising it afterwards, or that it was raised and that the court disposed of it by refusing to direct the inquiry, and in effect, therefore, decided against so charging the defendants. But if the common account against executors or trustees has been directed by the original decree, although the certificate may not find them liable to interest on the balance in their hands, yet the court will, on further consideration, so decree against them, if the certificate affords the materials, or will direct further accounts and inquiries, if necessary for the purpose ; the principle of this is, that if the common decree for an account is properly taken, it must show what balances were in the hands of the trustees from time to time, and therefore the court will see that its decree is effectually carried out : (see on this doctrine *Jones v. Morrall*, 2 Sim. N.S. 241.)

The general principle is, in fact, this : the court will not, on further consideration, do anything not intended and provided for by the original decree or the decree as varied in chambers pursuant to the 20th Order of October, 1852 ; and will assume that all that the parties desired to provide for was duly provided for by the original decree. Therefore matters neither decided, nor put in train of inquiry, nor reserved by the original decree, will be treated as abandoned : (see *Pas-singham v. Sherborn*, 9 Beav. 424.)

In general, only the parties to a cause can appear and be heard on further consideration, but to this there are exceptions. In legatee suits, and other suits of that class, for administering the estate of the testator, persons not parties to the suit having come in in chambers to establish their claim, and being affected by the certificate, may appear on further consideration, to support their claims if contested, and will be in the same position as to costs as if they had been parties to the suit.

It would be quite impossible, within the limits assigned to a work of this character, to point out all the minute directions and reservations for every conceivable state of things which may be requisite in a decree on further consideration. Thus, for instance, if the decree is to divide a fund in certain proportions, it will direct payment to those competent to receive and give a discharge ; but, if there are any of the parties entitled who are not so competent, care must be taken that the decree provides for carrying over their portions of the fund to a separate account, entitled accordingly, with directions for investment, and accumulation or payment of the interest, as the case may require ; and then the parties at the proper time will apply by petition to have their funds paid out to them. So, if the decree is in favour of payment to married women, it directs payment to their husbands, if the sums are under two hundred pounds, and are not subject to any settlement ; but if they are exceeding that sum, or subject to a settlement, it directs that they shall be carried over to the account of such married women, subject to the further order of the court ; and then, at any subsequent time, the married woman, if the fund is not settled, may, on a petition, have the fund dealt with, either by way of settlement, or by way of payment to her husband, on her being examined in court by the judge, as she may think fit, or in such cases, the married woman may appear, and be examined on the hearing on further consideration, and the court will decree accordingly. On an application, whether by petition or at the hearing on further

consideration, for payment to the husband of a married woman of a sum *not settled* and exceeding two hundred pounds, there must be an affidavit by the husband and wife, that there is not, and never has been, any settlement, or agreement for a settlement, either before or since the marriage. The usual terms of the affidavit are, "that no settlement, provision or agreement whatsoever for a settlement on our marriage, or in contemplation of our marriage, was, or has ever been, entered into by us, either before or at the time of, or at any time subsequent to, our marriage." If there has been a settlement, but it does not affect the fund in question, it must verify that fact. But the court, where there has been a settlement, never relies exclusively on the affidavit, but casts it upon the counsel for the married woman to read the original settlement, and to state in open court that he has so done, and that the settlement does not, in his opinion, affect the fund in question; and the practice is for the counsel, if he feels any doubt on the construction of the settlement, to read the passages in court on which he so feels doubt, and to submit them to the court.

The examination of the married woman is conducted by her coming into court, and being privately questioned by the judge on the bench, or sometimes he requires her attendance in his private room; and the order made should state the fact of her examination. As the examination is always strictly private, of course no one ever knows precisely what the nature of it is. But as very frequently misunderstandings take place, from the married woman being of course ignorant of legal language, and perhaps not being properly instructed, it may not be useless, to the young practitioner at least, to state that, in general, the judge does not put any leading questions, but satisfies himself, as well as he can, that the married woman knows and understands her rights with relation to the fund, and puts it to her to say what she wishes to be done with it. She should be therefore carefully informed, before she goes up, by her solicitor, and made to understand what her rights are, and informed how clearly to state her intentions.⁽¹⁾

(1) The writer was in court when a married woman, petitioning to have her fund paid to her husband, was examined, and the judge informed counsel that she wished to have the fund *settled*. She returned, after conference with her solicitor, and it appeared that she misunderstood the term, and meant she wished to have the matter settled by payment to her husband. Such a misunderstanding, from want obviously of previous explanation, might have led to serious delay, as the judge might well have hesitated to accept her explanation, at least for a time.

A decree made on further consideration must be drawn up, passed, entered, and enrolled in the same manner as pointed out in reference to a decree at the original hearing; and the same consequences depend on its being or not being so dealt with with reference to enforcing it; and it may be dealt with as to variation on motion, or on getting it set down to be spoken to on the minutes, in the same manner and to the same extent, but not further. When the decree on further directions is complicated, it is not an unusual and it is a very prudent course of practice, in order to avoid difficulties in drawing up and settling the minutes before the Registrar, to arrange that, when the court has decided what decree it will make, the cause shall stand over for a few days, for minutes, prepared in writing in detail, to be settled by the junior counsel on all sides, and then, on the day fixed, to take the decree in detail according to those minutes as finally corrected and settled by the judge in *the presence of all parties*.

III. Appeals.

I come now to treat of appeals from decrees and orders, but, first, of staying proceedings under a decree.

In general, the court will not stay proceedings under a decree, and it is much easier to say under what circumstances it will not, than under what circumstances it will.

The mere pendency of an appeal is not sufficient ground, as the court will always assume its decree to be right until the Court of Appeal has decided it to be wrong, and it will not, therefore, deprive the party claiming under it of the fruit of the decree. Irremediable danger that the execution of the decree may so operate upon the fund as to deprive the appellant of it, should he be successful, will not always do; thus, in *King of Spain v. Machado* (1 Myl. & K. 85), where the effect of the decree was to pay money into the hands of a foreigner about to leave the country, the court refused to stay execution of the decree pending an appeal; see also *Suisse v. Louther* (2 Hare, p. 438), where the court refused to stay the execution of an order by which money would be paid into the hands of the defendant, a foreigner, although the affidavits made a very strong case of probability that, if the order was carried into effect, an appeal would be wholly fruitless. So in a recent case (*Wright v. Vernon* Vice Chancellor Kindersley, not yet reported), where an application in the nature of a stay of execution, viz., an

application for a receiver where real estate had been declared to belong to the plaintiff, was made, the court would not listen to the circumstance that a petition of appeal was lodged, as a reason for depriving the plaintiff of the immediate fruit of execution of his decree.

There are, indeed, some cases where execution of a decree has been stayed pending an appeal, as where a demurrer had been overruled by the Lord Chancellor, a stay of proceedings to enforce an answer was granted pending an appeal to the House of Lords, the party moving of course paying the costs of the motion, which would be, indeed, almost as of course, the rule being that any party coming to the court for an indulgence must pay the costs of obtaining it.

So in a case of *Attorney General v. Munro* (12 Jur. 318), the court stayed the execution of a decree, the effect of which would be to remove the minister of a church and deprive the defendants, who were trustees, of the future management of the trust property. On the former case, and there are others of the same class, the observation is, that the decree was not a final decree, nor a decree deciding any rights; but merely deciding that the defendant ought to answer, and consequently, if he answered, pending an appeal, the subject-matter of appeal was not as in *Walburn v. Ingelby*, and *Lowther v. Suisse*, contingently, but absolutely gone; and upon the *Attorney General v. Munro*, though a stronger case, this observation occurs, that the contest was really between trustees and one portion of the *cestuis que trust*, and was not whether A. or B. was the owner of property, but, in substance whether A. or B. should execute certain functions for C. and others; the injury, therefore, to the successful party by suspending his enjoyment of the decree, was trifling in comparison to the injury to the party against whom it was to be enforced, if he should turn out, on appeal, to be right.

It will be gathered from the cases referred to, that there is no positive rule on the subject, but each case must stand on its own particular merits. Thus much, however, by way of caution may be stated as the result of the authorities, and of acquaintance with the general course of practice of the court:—I. That the court leans strongly against suspending the execution of a decree; II. That it may be induced to do so, where the decree or order has not positively decided a right of enjoyment, but has only given some advantage to one of the parties; and, III. That it will be quite the exception for it to do so, when it has, by its decree or order, finally decided a contested right of enjoyment of property.

The course of proceeding to stay the execution of a decree or order is by motion on notice to all parties interested in the decree; it must be made in the first instance to the judge who pronounced the decree: (46th Order of 1828.) But from him an appeal will lie to the Lords Justices, and to the House of Lords. If the motion is refused, it will be almost of course with costs. If granted, it is presumed the applicant will still pay the costs, on the ground of his asking an exceptional indulgence. But it is possible that the costs may be made costs in the cause, on the principle laid down in *Stevens v. Keating* (1 Maen. & Gord. 659), inasmuch as, if the appeal should be successful, the result would be that the decree ought never to have been made, and therefore that the appellant was right in seeking to stay its execution.

An appeal lies from a decree or decretal order, as we have already had occasion more than once to describe, to the Lords Justices, if the decree has not been enrolled; but if it has been enrolled, then, as the decree is the decree of the Lord Chancellor, the only appeal is direct to the House of Lords, or it may be re-heard by the same judge who decided it.

I have stated the appeal as to the Lords Justices, because that is the usual course. The structure of the Court of Appeal is this: The Lord Chancellor and the Lords Justices form together but one Court of Appeal: (14 & 15 Vict. c. 83, ss. 1 and 11.) But either the Lord Chancellor sitting alone, or the Lords Justices sitting together, may exercise the full power of the court as a Court of Appeal, and in practice the appeal is always to the Lords Justices, and is set down before them, unless otherwise ordered. If parties desire their appeal to be heard by the Lord Chancellor or by the full court, they must apply to the Lords Justices for permission to apply to the Lord Chancellor, and being provided with their assent, they apply to the Lord Chancellor to hear it alone, or in full court, as the case may be. But a special case must be made to induce the Lord Chancellor to allow the case to be taken out of its regular course of being heard by the Lords Justices.

The Master of the Rolls, or a Vice Chancellor, may re-hear his own decree, but cannot re-hear a decree pronounced by either of the others of those judges. But as to orders of course made on petition or motion of course, made by any of the judges including the Lord Chancellor, any one of the judges of the court may re-hear, and vary or discharge such an order. In such cases, the application should be made to the judge to whom special applications in the same cause or

matter are made: (26th Order, November, 1850.) Before a cause can be heard on re-hearing or on appeal, the decree must be drawn up. A decree in minutes only cannot be appealed from.

To procure a re-hearing or appeal, a petition of re-hearing or appeal must be prepared, and signed by two counsel; usually they are the counsel who have conducted the case below; the junior prepares the draught, and signs it, and it is then laid before the senior counsel, who peruses and signs it. But it is not absolutely necessary that either of the counsel should be the same who have appeared below, nor need either of them be within the bar.

A petition of appeal is now very short: it recites merely that by a decree dated () made by (the judge below) it was decreed (stating the decree), and then it states that the petitioner feels himself aggrieved by the decree, if he appeals from the whole of it, or by so much of the decree as he appeals from (referring to it), and prays that the court will be pleased to reverse or vary the decree, as the case may be. The counsel sign a statement, at the foot of the draught, that they conceive it to be a proper case to be heard (or re-heard), as the case may be.

Some doubt seems to exist at the bar, as to the duty of counsel on signing a petition of appeal, when they are clearly or even strongly of opinion that an appeal cannot be sustained; and I have heard of cases where, under that feeling, counsel have refused to sign. I have taken some pains to inform myself of the strict practice, by consulting gentlemen of great eminence and experience, and I believe the rule is that counsel, if properly instructed, are bound to draw and to sign a petition of appeal, however much they may believe the appellant has no case, or doubt or disapprove of the righteousness of his case, of which the Court of Appeal only is to be the judge; and that they are only at liberty to refuse to sign a petition of appeal, if they are of opinion that the nature of the case is such that it is a scandal to the court.

An appeal must be set down for hearing, and due notice thereof given to the parties interested, within five years from the date of the decree (1st Order, August, 1852), unless the court enlarges the time.

The petition is copied on paper and left with the secretary of the Lord Chancellor, who answers it by directing the appeal to be set down on the petitioner subscribing the petition, and consenting to pay such costs as the court shall think fit to order, in respect of any proceedings since the

decree, and on depositing twenty pounds with the Registrar. The deposit should be made within a week after the petition has been answered.

The order to set the appeal down is passed and entered, and a copy of it served on the respondent or respondents. As to the persons who should be served, all parties who are interested in the decree, or the portion of it appealed from, should be served.

The respondent procures for himself a copy of the petition of appeal from the Registrar's Office. The appeal is set down in its regular course by the Registrar, and comes on to be heard in its turn.

The briefs on appeal are exact repetitions of the briefs delivered on the hearing of the decree appealed from, or of so much of those briefs, if the appeal is only partial, as relates to the part appealed from, and also of a copy of the petition of appeal.

If the appeal is from the whole decree, the plaintiff's counsel begin as they did in the court below; but if the appeal is only from part of the decree, the appellant begins.

Only the appellant's counsel can be heard in support of the appeal; but the counsel of all the parties interested in supporting the decree may be heard.

It seems scarcely necessary to say, that, as at the hearing of the cause in the court below, the appellant's solicitor should have in court an affidavit of service on the respondents of the order to set down the appeal; and that, in like manner, the respondents' solicitors should take care to be furnished with affidavits of their having been served.

An appellant appealing only from a part of a decree is confined in the first instance to the matter against which he has appealed; that is, so much of the decree as he has not appealed against he is bound by. But with the respondent it is different: he may re-open the whole case if he thinks fit, and convert it into a re-hearing of the whole decree. Of course, then the appellant has the same liberty, and the court will then vary the decree, if it sees ground for so doing, *ultra* the variations sought by the appellant.

It is needless to observe that it must be an unusual case in which such a course is prudent for a respondent; as, in addition to the danger that the Court of Appeal may take from him the whole or a part of the decree which he had in the court below; if he fails to induce the court to vary the part of the decree unappealed from in his favour, then as the court treats it as a re-hearing of the whole case, it will sometimes make him pay costs; whereas, the general rule

of the court as to costs on appeal is, that though the court may allow the appeal, and make a different order as to costs below from that made by the court below, it will not make the respondent in possession of the decree pay any costs of the *appeal*.

As an appeal is considered as in the nature of a re-hearing, it follows that the parties are in the same situation, as to the evidence, as they would be if the court were hearing the case, or so much of it as is the subject of appeal, for the first time. Consequently each party uses as much or as little of the evidence taken in the cause as he thinks fit, at least so far as he might have done at the hearing below. Evidence, read below, is not therefore made evidence on appeal, if it is not then read or put in as read; and on the other hand, evidence not read below may be read on the appeal; but no new evidence taken since the decree can be read, except such affidavits as fall within the 13 & 14 Vict. c. 35, which may be read: (*Fowler v. Reynal*, 3 Macn. & Gord. 500.) And the Court of Appeal has the same power which the court below had of examining parties and witnesses orally, if it thinks fit, whether they were examined below or not: (see the 15 & 16 Vict. c. 86, and *Hope v. Threlfall*, 23 L. J. 631.)

Appeals from orders made on motion by the Master of the Rolls, or one of the Vice Chancellors, to the Court of Appeal, do not require a petition of appeal. They are made on notice of motion in the same manner as an original notice of motion, and served in the same manner two clear days before the day for which the notice is given. The notice of motion is signed by the solicitor of the appellant, and addressed to the solicitors of the parties entitled to be respondents. It is usually drawn by the solicitor, but is sometimes settled by counsel. A fee to counsel for settling a notice of motion is not as of course allowed, but may be, and sometimes is, allowed in the taxation of costs. The motion must be heard on the same evidence as the motion in the court below, if it is to be treated strictly as an appeal motion; but either party may introduce new evidence, if he thinks fit to convert the appeal motion into a new motion in the nature of an original motion. The difference is this: on an appeal motion proper, the Court of Appeal will only deal with the order of the court below as to those portions against which the appeal is, and will treat the other parts of the order as not appealed from, and conclusive; but if it is converted into a new motion, then the court will deal with the whole case, and make such order on the whole, as it thinks fit.

In the Court of Appeal, motions are not heard, as in the court below, according to the seniority of the counsel moving, but a paper of appeal motions is made by the Registrar, and the appeal motions are heard in their turn in the paper.

An appeal from a decree or order, made on a motion for a decree, is also made by motion and not by petition of appeal, and it follows, as to the preparation of the notice and its service, the practice on ordinary appeal motions. But as the hearing of a motion for decree is held to be the hearing of a cause, so the appeal motion is dealt with in some respects as an appeal from a decree in a cause, and such motions are put into the paper of cause appeals.

I have already observed that, on motions before the Master of the Rolls or the Vice Chancellor, oral evidence cannot be taken on the hearing of the motion in court, except by consent; and the same rule prevails as to ordinary motions in the Appeal Court. But I apprehend, on an appeal motion against a decree made, or a *motion for decree*, it would be otherwise, that not being strictly a motion, but an appeal from the hearing of a cause.

An appeal lies also from any order made by the Master in any matter arising under the Winding-up Acts; and such appeals are also conducted by way of motion on notice to discharge or vary the order made by the Master. The practice is also the same upon them as upon other appeal motions. The evidence consists of the evidence by affidavit, or by oral deposition, and the documentary matter made evidence in the Master's Office. Appeal motions from the Master are made to that branch of the court from which the Winding-up Order emanated; and they must be made, that is, notice of motion by way of appeal must be given, within fourteen days from the date of the Master's order being signed. And if the party is dissatisfied with the decision of the Master of the Rolls or one of the Vice Chancellors, and desires to appeal to the Lords Justices, notice of motion of such appeal must be given within three weeks from the date of the order being made.

A notice of motion for appeal from an order of the Master in a winding-up matter usually recites the order made by the Master, and then goes on to state that the court will be moved (on or before, &c. in the usual form), to vary or discharge the said order, if the whole is appealed from, or so much of the order as the appellant is dissatisfied with, if his appeal is partial.

The certificate of the judge, made on hearing in chambers,

or made *pro formâ* in chambers and afterwards affirmed in court, is also appealed from to the Lords Justices by motion, without any petition of appeal. If the Court of Appeal affirms the certificate, it is then proceeded upon to the hearing of the cause, in the same manner as if it had not been objected to. If the Court of Appeal varies it so that it does not require further inquiries, it will be proceeded upon in the same manner. If the variation is such as to require further inquiries, the matter must go back into chambers, and a further certificate, consistent with the decision of the Court of Appeal, must be made.

Appeals from orders made on petitions, are treated in the same way, as to the initiation of the proceedings, as appeals from decrees in a cause; they must be made on a petition of appeal, which recites the order only and prays that it may be discharged or varied wholly or in part, as the appellant requires; and the petition of appeal is signed like a petition of appeal from a decree, only it is signed by one counsel and the petitioner's solicitor. The briefs consist of the same matter as the briefs in the court below, with the addition of a copy of the petition of appeal.

Appeal to the House of Lords.

Generally, an appeal lies to the House of Lords from any decree, or from any interlocutory order of the Court of Chancery, as to a decree, as already mentioned, upon its being enrolled; but it will not lie for costs alone, nor against decrees or orders taken by consent. But it must not be understood that the House of Lords will never deal with the costs below.

If an appeal is brought on the merits, and not on colourable grounds of appeal, for the purpose of re-hearing the question of costs, the House will not treat that as an appeal for costs, but will even, in affirming the judgment below, consider the question of costs; and when there is hardship on the appellant, reverse so much of the judgment below as gave costs against him: (*Inglis v. Mansfield*, 3 Cl. & Fin. 362.)

A petition of appeal to the House of Lords from any court of equity must be presented within fourteen days from the first day of every session or meeting of Parliament after a recess, unless upon a decree made while Parliament is actually sitting, in which case the party may present his petition of appeal within fourteen days after the decree is

made and entered : (102nd of the Standing Orders, formerly 55.)

By the 103rd Order (formerly 118) no petition of appeal can be received after two years from the signing and enrolling of the decree, and the end of fourteen days, to be counted from the first day of the session or meeting of Parliament next ensuing the said two years. Unless the person entitled to the appeal is under twenty-one, or covert, or *non compos mentis*, or imprisoned, or out of Great Britain and Ireland, in which case he may bring his appeal within two years after the disability has ceased, and fourteen days from the commencement of the session next ensuing the two years; but in no case is a longer time than five years from the date of the decree, *on account of mere absence*, to be allowed.

But the House of Lords will, under circumstances, give leave to appeal, though the time prescribed by the 102nd Order has elapsed, on a petition signed by the appellant, if he is within reach, or his solicitor or agent, if he is not accessible. Several cases of this kind are mentioned by Mr. M'Queen in his treatise on the Appellate Jurisdiction of the House of Lords, p. 100, *et seq.*; but with the exception of *Patterson v. Patterson*, 16 Dec. 1778, in which mere ignorance by the Scottish agent of the standing orders was allowed as an excuse, they are all cases of almost unavoidable impediment; and not such as to afford any ground for anticipating that, except under very unusual circumstances, the House would give time for an appeal from the English Court of Chancery.

Before presenting a petition of appeal, the party appealing must give notice to the agent of the intended respondents of the time when such petition of appeal is intended to be presented, and the day on which such notice was given or caused to be given, must be indorsed by the agent or agents for the petitioner on the back of the appeal: (107th Order.)

The petition of appeal is prepared by counsel. It is addressed to "The Right Honourable the Lords Spiritual and Temporal, in Parliament assembled." It is entitled the humble petition and appeal of A. B., with his description and address. It states the institution of and proceedings in the cause; that the petitioner is advised that the decree is erroneous, &c., and it prays that it may be reversed, varied, or altered; and that an order may be issued requiring the respondent or respondents to put in an answer to the petition, and that service of the order made on the respondent's solicitor may be good service. The petition *must* be signed

by two counsel, who must be the counsel who were of counsel below, or who are to attend as counsel at the bar of the House on the appeal, and the counsel certify that in their judgment there is reasonable cause to appeal: (105, formerly 58.)

The petition of appeal is engrossed on parchment and delivered at the Parliament Office, and the officers of that office will put it in train to be presented, and to obtain the order requiring the respondents to answer.

The order must be served upon the solicitor of the respondent, and the appellant should be provided with an affidavit of the service. Within eight days after the appeal has been received (that is, after the House has received it) and an order made upon it, the appellant must give security to the Clerk of the Parliament, by recognizances to the Crown for four hundred pounds, by way of security for costs.

A petition of appeal may be amended. For that purpose a petition must be presented to the House, stating what is the error in the appeal petition, and praying leave to amend it. 'Two clear days' notice of presenting the petition must be given to the respondent.

A petition of appeal may be met, either by answer or by preliminary objections. If the respondent is advised that the appeal is irregular, he does not answer it, but presents a petition to the House on two days' notice to the appellant to dismiss the appeal. That petition will be referred to the appeal committee, who decide on the matter, and either dismiss the appeal, or dismiss the petition; or in some cases report to the House, and the House then hears the case argued by one counsel on each side.

Any objections which are not to the regularity, and therefore to the dismissal, of the appeal, but to its completeness, as objections for want of parties, or the omission of something material to the decision of the case, should be taken by way of petition to the House, praying that the appellant may be ordered to amend the respondent's copy. And these should be taken before putting in an answer, as it cannot be at all confidently anticipated that the House will, at the hearing, allow objections to be taken which might have been, and have not been taken before answering.

The petition being served, the respondent, if making no preliminary objections, answers it. The answer is usually merely formal: it admits the decree and proceedings, but refers to them for their precise contents, and submits that the decree is right and ought to be affirmed. This answer is engrossed on parchment, signed by the respondents'

solicitors, and delivered to the Clerk of the Parliament Office.

When the respondent puts in his answer within the time limited by the order, either party may move, by leaving at the Parliament Office a motion paper, to have the cause set down to be heard.

If the respondent does not duly answer, the appellant moves, by delivering a motion paper at the Parliament Office, upon affidavit of service of the order, that a peremptory day shall be fixed for his putting in his answer without any further notice to the respondent, and a peremptory order is thereupon made: (Order 109, formerly 106.)

If the respondent does not comply with this order, the course is, not to make any application in the nature of an application for contempt, but to apply by a motion paper alleging the peremptory order, and that the respondent has not complied with it, to have the cause heard *ex parte*, and such order will be made as of course.

When matters have proceeded thus far, each party proceeds to prepare his printed case. The case should contain a succinct statement of the proceedings below, and of all the facts on which the party preparing it relies and intends to prove. The best guide to drawing the case is in fact to conceive oneself making the statement of the matter and facts, at the bar of the House, which would precede argument on the questions of law. The evidence intended to be relied upon is printed *in extenso*, and documents proved are referred to in an appendix to the case. The case always concludes with the reasons for the appeal, which should exhibit succinctly the points on which the party relies. The case is to be signed by one or more of the counsel who attended at the hearing of the cause below, or who shall be of counsel at the hearing before the House: (114th Order, formerly 59.)

The printed case must be delivered to the Clerk of the Parliament or clerk assistant, at least four days before the hearing. It is usual to print five hundred copies, fifty of which are left with the clerk of the tables, and three hundred and fifty for the door keepers, and one hundred are kept for the use of the counsel, solicitors, and parties, and for exchange with the other side, it being usual for each party to deliver to the other a certain number, agreed upon, of his own printed case.

Also, the House permits, and it is usual, in order to save expense, for the appellant and respondent to prepare, a

joint appendix. With regard to the evidence, it is a settled rule that no evidence can be brought before the House, on appeal, but that which was read or entered as read in the court below; nor can any evidence read below be objected to, unless the admission of that evidence is one of the grounds of appeal. But if new evidence is discovered since the hearing of the cause below, the House will sometimes remit the cause back, to give the party the opportunity of introducing that evidence, and the court below will be directed to hear the evidence.

When the cause is brought on to be heard, the course is this:—The appellant's leading counsel begins, and states and argues on the case; his junior then reads the evidence and argues; then the respondent's counsel do the same; and the appellant's leading counsel replies. This is pursuant to the 127th Order (formerly 56), and by it, therefore, and in practice, no more than two counsel are ever heard by the House, unless, indeed, on the same side there are distinct, and to some extent opposed, interests, and then the House will sometimes, on special application, allow more than two counsel to be heard on the same side. But either party may instruct more than two counsel to appear, and they may consult with and assist those who argue.

Both parties may be dissatisfied with the judgment of the court below; in that case the respondent to the appeal first lodged may present a cross-appeal. A cross-appeal must be presented within a fortnight after the answer put in to the original appeal, otherwise it will not be received: (104th Order, formerly 127.)

As a cross-appeal is in fact nothing more than an appeal, it differs from it in its prosecution in no material particular. It should be headed, however, in terms as a cross-appeal, and when there are appeal and cross-appeal, the two are heard as one cause.

With regard to the costs of appeals to the House of Lords, the 138th Order (formerly 215), provides that in all cases in which the House shall make any order for the payment of costs by any party or parties in any appeal or writ of error, without specifying the amount, the Clerk of the Parliament or clerk assistant shall, upon the application of either party proceed to, the taxation of such costs, in such manner as is directed by an act passed in the 7 & 8 Geo. 4, entitled "An act to establish a Taxation of Costs on private Bills in the House of Lords," and shall give a certificate thereof expressing the amount of such costs; and that the same fees shall be demanded from and paid by the

party applying for such taxation, for or in respect thereof, as are now or shall be fixed by any resolution of the House concerning fees made or passed in pursuance of the said act or in relation thereto. The clerk may either add or deduct the whole of such fees at the foot of his certificate; and the amount in money certified by him, after such addition or deduction, shall be the sum to be demanded or paid, under or by virtue of the order for costs. With regard to the course of the House about costs, it is generally this: It never gives the costs of an appeal to the appellant; but it will deal with the costs below as shown in the case cited *ante*, p. 174. If a respondent does not answer, he will have no costs, even though he be successful. But if he has conducted his case regularly, he will usually have his costs.

The costs of interlocutory applications are in the discretion of the House, and no rule can be laid down about them.⁽¹⁾

Of Special Cases

There is a certain class of cases which are conveniently brought before the court for decision, by special case, under the provisions of the 13 & 14 Vict. c. 35, commonly known by the name of "Sir George Turner's Act."

By that act, persons interested or claiming to be interested in any question cognisable in the Court of Chancery, as to the construction of any act of Parliament, will, deed, or other instrument in writing, or any article, clause, matter, or thing therein contained, or as to the title or evidence of title to any real or personal estate, contracted to be sold or otherwise dealt with, or as to the parties to, or the form of any deed or instrument for carrying any such contract into effect, *or as to any other matters falling within the original jurisdiction of the court as a court of equity*, or made subject to the jurisdiction or authority of the court by any statute not being one of the statutes relating to bankrupts, and including among such persons all lunatics, married women, and infants, in the manner and under the restrictions contained in the act, may concur in stating such question in the form of a special case for the opinion of the court, and it shall be also lawful for all executors, administrators, and trustees to concur in such case: (sect. 1 of the act.)

⁽¹⁾ The orders above cited, are quoted from the Standing Orders published in 1849 by the Queen's Printers.

When there are but few parties, and those *sui juris*, and the facts are not complicated, there is no great difficulty in working a special case. But where the facts are complicated, or the parties numerous, and particularly when any of them are under disability, the course of proceeding presents many difficulties. It must be clearly understood also, before selecting this course of proceeding, that the decision of the court in a special case is only binding as between the parties to the same extent "as such a declaration would have been if contained in a decree made in a suit between the same parties instituted by bill." It is therefore wholly inapplicable, and may occasion much delay and expense if it is attempted to be resorted to in a case in which material parties, the discussion of whose interests may affect not only the rights of the parties to the special case, as between them and the persons not parties, but the rights of the parties to the special case *inter se*. An instance of this occurs in the case of *Evans v. Saunders*, and *Evans v. Evans*, 2 Drew. 415 and 654. In that case, the facts raised the question of the destruction or exhaustion of a power. It came on originally as a special case between the devisees of the will of Ann Evans, and a purchaser under the devise, and a defendant who claimed as tenant in tail. The case was elaborately argued, and judgment given against the valid execution of the power. It afterwards appeared that there was a suit of *Evans v. Evans*, involving the rights of other parties in the same question, who were not made parties to the special case, and the court was compelled to hear the whole matter over again.

Special cases are entitled as in a cause between some or one of the parties interested, or claiming to be interested, as plaintiffs or plaintiff, and the others or other of them as defendants or defendant. In the title, lunatics and infants must be described as such, and their committees, guardians or special guardians must be named, and if a married woman is named as a plaintiff, and her husband as a defendant, a next friend of the married woman must be named in the title.

The special case must concisely state such facts and documents as may be necessary to enable the court to decide the question: and if only parts of, or the substance of, documents are there stated, at the hearing the parties may refer to the whole document; and the court may draw from the facts and documents any inference which it might have drawn from them if proved in a cause.

It must state how the guardian or special guardian of a lunatic was constituted; and if a married woman party to it claims any interest distinct from her husband, it must state that she concurs in the case in her own right.

As special cases are not very frequent, and I am not aware of forms of them being printed in any work on practice, it will be convenient to the practitioner here to insert a form.

Between A. B., C. D., and E. F., plaintiffs,
and
G. H., and I. K., defendants.

By certain indentures of lease and release dated the _____, the release being between (*state parties*), after reciting (*insert the material recitals*) it was witnessed that (X.) granted and released to (the donee and parcels.)

Then follows the same kind of statement of other material deeds, showing how X. dealt from time to time with the land.

X. made his last will and testament in writing, dated, and which was, &c. And by the said will the said X. (*state the devise giving the land to the plaintiffs in trust for sale.*)

X. departed this life on or about, &c., without having altered or revoked, &c.

The said (plaintiffs) accepted the said trusts, &c. The plaintiffs did, on the death of X., enter in the possession or receipt, &c. (*and then state the sale to the defendant, I. K.*)

Then state the pedigree of G. H., showing how he claims to be tenant in tail of the land, and allege its descent upon him as such tenant in tail.

G. H. is living and is a defendant, and he contends that he is entitled (*state how.*)

The plaintiffs as such devisees in trust as aforesaid, submit (*stating the grounds of their title.*)

The questions submitted for the opinion of the court are as follows:—

1. Whether—*The questions on which the parties desire the opinion of the court are stated in numbered paragraphs, if there are several questions.* (1)

The special case must be signed, and is therefore always drawn by counsel. It must be signed by counsel for all parties; it is, therefore, usually drawn by counsel for the plaintiffs, and settled by counsel for the defendants. It is engrossed, and is to be filed in the same manner as bills are filed; and the defendants may appear thereto in the same manner as defendants appear to bills. The plaintiff takes an office copy, but the defendants cannot be required to do so.

If a lunatic is interested, his committee may, on being authorized by the Lord Chancellor, but not without, concur in the case in his own name, and in the name of the lunatic, and on his behalf.

(1) See also *Groom v. Booth*, 1 Drew. 648.

Where husband and wife are interested in the same right, the husband may concur in his own name, and in the name of his wife; if the married woman has a distinct interest, she may concur in her own right, provided her husband also concurs.

If an infant is interested, his guardian may concur in the name and on behalf of the infant, unless he has an interest adverse to that of the infant.

If a lunatic not so found by inquisition is interested, or if an infant is interested, any person may, on behalf of the lunatic or infant, apply by motion or petition to appoint a fit person to be special guardian to the lunatic or infant, and the court will thereupon make such order appointing such person, who may then concur on behalf of the lunatic or infant. The person tendered must be shown by affidavits to be fit, and to have no adverse interest. This order is obtainable without notice to any other persons, unless the court shall require notice to be given to any person.

If a special guardian to an infant is appointed without notice to the regular guardian of the infant, the court may, on the application of the regular guardian, by motion or petition, discharge the special guardian, and may appoint some other person to be special guardian.

When a special case has been filed and the defendants have appeared, the parties to it are subject to the jurisdiction of the court, as if a bill had been filed and appearances had been entered by the same parties; and all the parties except married women, infants, and lunatics, are at once bound by the statements made in the case. But married women, infants, and lunatics are not bound by such statements till the court has given leave to set down the case.

Accordingly, when married women, infants, or lunatics are parties, a motion must be made for leave to set down the case, and of such motion notice must be given to every executor, administrator, trustee or party in whom any property in question is vested for the married woman, infant, or lunatic; and if the motion is not by the married woman, infant, or lunatic, but by some other person, notice of the motion must also be given to the married woman and her husband, or the infant, or to the lunatic and his committee.

If the statements in the case affect (as they of course generally must), the interest of a married woman, lunatic, or infant party, the motion must be supported by affidavits verifying those facts; otherwise the court will refuse to let the case be set down, but it may, if not satisfied of the truth of the statement, refer the matter for inquiry to the Master.

The course would now be to direct inquiries in chambers, and on the chief clerk's certificate signed by the judge, the judge would, on a further motion made on the certificate, at his discretion, give or refuse leave to set the cause down.

If none of the parties are under disability, the special case may, when the defendants have appeared, be set down for hearing, upon the record and writ clerk's certificate that it is in a fit state to be heard, and upon subpœna to hear judgment being issued and served, as they would be for hearing a cause.

When the special case is brought on to be heard, the course is for the counsel for the plaintiff to be heard first; then the counsel for the defendants in the order in which they appear on the special case, and then for the plaintiff's counsel to reply. The briefs will consist of the special case and any documents referred to but not set out, and nothing more, except such observations as the solicitor thinks fit to append, in the same manner as with briefs on the hearing of a cause.

What the court will do on hearing a special case is this: It will, by its decree, declare its opinion upon the questions submitted to it, and upon the rights of the parties; but it will not proceed to administer relief: (14th clause.)

By the same clause it is empowered, if it thinks fit, to send a case for the opinion of a court of law upon any of the questions.

But by the 16th clause of the 15 & 16 Vict. c. 86, the judges of the Court of Chancery are deprived of the power of sending, in any *cause or matter*, cases for the opinion of a court of law, and are to decide the legal question, if any, themselves. But they may be assisted in that new jurisdiction, under the 14 & 15 Vict. c. 83, s. 8, by which they are authorized to sit with the assistance of a judge of the common law, if such judge shall find it convenient to attend.⁽¹⁾

Now, Sir G. Turner's Act empowers the judge, on the hearing of a special case, to send a case as above pointed out for the opinion of a court of law. But, having regard to the lan-

(1) Before that act, the Lord Chancellor had always power to sit with the assistance of a judge of the common law, and frequently exercised it. Since the act, both the Lord Chancellor, and the Lord Chancellor with the Lords Justices, and the Lords Justices without the Lord Chancellor, have acted under it, and sat with the assistance of a judge of the common law. But I am not aware of any instance in which the Master of the Rolls or a Vice Chancellor has done so; and cases have occurred in which a Vice Chancellor has been pressed to call in the assistance of a common law judge, and has declined to do so.

guage of the 61st clause of the 15 & 16 Vict. c. 86, it is submitted that the power given by Sir G. Turner's Act is taken away, and that on hearing a special case, which is usually treated as a *cause*, and if it is not a cause, is clearly a *matter*, the court must decide itself any legal question, with or without the assistance of a judge of the courts of common law.

The court also, if it is of opinion that the questions raised by the special case or any of them cannot properly be decided in the case, may refuse to decide them: (s. 14 of the act.) In this, the procedure on the special case differs from that in a suit, on which the court *must* decide the questions regularly presented to it.

By the 15th section of Sir G. Turner's Act, every executor, administrator, or trustee, or other person making any payment, or doing any act in conformity with the declaration contained in any decree made upon a special case, is in all respects as fully and effectually protected and indemnified by such declaration, as if such payment had been made, or act done, under or in pursuance of the express order of the court, made in a suit between the same parties instituted by bill, save only as to claims or rights of any person in respect to matters not determined by the declaration. But the court has no power to bind the *rights* of the parties as on a bill or claim. It has only power to decide questions of *doubtful construction*, and therefore, there being a question in dispute between the parties upon facts, the court refused to decide it: (*Bailey v. Collett*, 23 L. T. 230.)

As to the costs of special cases, it was for some time apparently a matter of doubt whether the court could give costs; but the 32nd section of the act expressly provides that, until rules or orders are made, and if not applicable when made, the practice shall be according to the act and the practice of the court. The practice is now to hold that the court has power to direct costs under that section; at any rate, the authority to direct costs is constantly exercised.

The decree made on a special case may, like any other decree, be reheard or appealed from, and if parties desirous of having it reheard or appealed against, desire also, that in the mean time the declaration may not be acted upon, the court has express power, under the 16th section, on application either at the time of the decree being made, or at any time afterwards, and upon such conditions as it may think fit, to order that the declaration shall not be acted upon for such time as the court thinks just.

The act is silent as to the mode of application; it is there-

fore apprehended that, if made after the decree, as a substantive independent application, it will be by motion on notice to all the parties to the special case.

When the evidence of any of the facts in a special case is doubtful, the proper course is to state all the facts which can be ascertained, and verify by affidavit, if required, that no further evidence can be given; the court cannot adjudicate on an allegation of doubtful facts, nor direct an inquiry: (*Domville v. Lumb*, 9 Hare, App. 65.)

The costs on a special case follow the general rule of administration suits; they are payable out of the general residue; and if there be none, out of the property specifically bequeathed: (*Cookson v. Bingham*, 17 Beav. 262.)

From the above statement of the various and minute precautions imposed by the act before a special case can be heard, and the circumstance that, after it has been heard, the decision amounts only to a declaration of rights, and not to any order for relief, it is obvious that, in a case where there are many persons under disability, with or without a complicated state of facts, or even where the facts are complicated or in the least degree doubtful, with or without the adjunct of disabilities, the proceeding by special case is not, in general, advisable, especially having regard to the 50th section of the 15 & 16 Vict. c. 85, by which the court may, if it thinks fit, make a declaratory decree, merely declaring rights, without following it up by directing relief. So that in a case where it is desired merely to ascertain the rights of the parties, that object can be as well and as effectively attained by a bill praying a declaration of rights, as by a special case, and with this advantage, that as the suit must be complete as to parties according to the regular practice of the court, the declaratory decree so obtained is as effectually binding as any other decree as to the persons bound.

Of the proceeding by Claim.

I proceed now to treat of claims, and I shall do so very shortly, and without entering into much detail, because claims are, and justly so, going rapidly out of use. They were, for certain kinds of cases, a great improvement on the old procedure; but all their advantages have been swept away by the improved proceeding by bill or summons under the 15 & 16 Vict. c. 86, and the orders made under it. And I am not aware of any kind of case, unless of a very exceptional character, in which a remedy under the

new practice may not be obtained as speedily, as cheaply, and more conveniently, than under the proceeding by way of claim.

A suit may be instituted by claim as well as by bill. Claims are of two kinds: *common* claims, and *special* claims.

Common claims are those applicable to the cases expressly pointed out in the General Orders of April, 1850. They are as follows:—I. Claims for the administration of personal estate by a creditor. II. For payment of legacies. III. For an account and payment by residuary legatees. IV. For account of personal estate, and payment by next-of-kin. V. For administration by an executor or administrator. VI. By a legal or equitable mortgagee or person entitled to a lien as a security for a debt, seeking foreclosure, or otherwise to enforce his security. VII. By a person entitled to redeem any legal or equitable mortgage, or any lien, seeking to redeem the same. VIII. By a person entitled to specific performance of an agreement for sale or purchase of any property seeking such specific performance. IX. By a person entitled to an account of the dealings and transactions of a partnership dissolved or expired, seeking such account. X. By a person entitled to an equitable estate or interest, and seeking to use the name of his trustee in prosecuting an action for his own sole benefit. And, XI. By a person entitled to have a new trustee appointed in a case, where there is no power in the instrument creating the trusts to appoint new trustees, or where the power cannot be exercised, and seeking to appoint a new trustee.

These are the subject of *common* claims: (Order 1.) All other causes fit to be dealt with at all, by way of claim, are to be instituted by what is termed the *special* claim: (Order 11.)

A common claim is drawn in the form prescribed for the particular class of case by the Orders of 1850 (see the schedules to those orders), with such variations in the language and statements as the nature of the circumstances may require.

A special claim is not more limited in its language or statements than a bill. It is, in fact, simply a bill with a slightly different frame and heading, and without interrogatories.

Claims, whether common or special, must be signed by counsel. Common claims are frequently drawn by the solicitor, and only perused and signed by counsel; special claims are and should be always drawn as well as signed by counsel.

A common claim may be filed as of course without leave; a special claim cannot be filed without special leave of the

court, to be obtained by an *ex parte* application or motion, and the court always requires counsel to certify at the bar on the motion that the claim has been settled and signed by counsel.

Claims, whether special or common, are filed like bills at the Record and Writ Clerk's Office, but a special claim must be indorsed by the Registrar with the leave given by the court to file it. The solicitor should therefore always, immediately after the leave has been obtained, go to the Registrar of the day with the claim, and get it indorsed at once.

Claims are, since the 15 & 16 Vict. c. 86, and the orders of 1852, printed like bills, on royal paper quarto, in pica type, leaded, and the copy filed is to be interleaved with paper of the same description.

Claims may be amended at any time before the hearing, by an order of course, and although the claim has been set down (see *Potts v. Thames Haven Dock Company*, 15 Jur. 762; and *Gwynne v. British Peat Company*, 17 Beav. 7); and they may be amended at the hearing, by order, the plaintiff paying the costs of the day.

An injunction cannot be obtained on a claim. This point was much discussed in the beginning of the practice by claim, but it has been long well settled. But a receiver may be obtained on a claim, either at or before the hearing.

When a claim has been filed, the defendants are served with a printed copy of it, with an indorsement thereon pursuant to the 15 & 16 Vict. c. 86, but *semble* on the claim the indorsement need not be printed; at any rate, if printed, it may be altered before it is served, if the time for appearance has been varied by order: (*Baynes v. Rigge*, 9 Hare, App. 27.)

The service must be like that of a bill, and the court may, as on a bill, order substituted service.

A defendant may, but is not compellable to enter an appearance to a claim; that is, if he does not appear, he cannot be proceeded against for contempt, nor can the plaintiff enter an appearance for him: (*Smith v. Corles*, 15 Jur. 4.) The effect of his not appearing is simply that a decree on the merits shown by the plaintiff on his claim and evidence, will be taken against him by default, if he neither enters an appearance, nor appears by his counsel or in person at the hearing.

A claim is supported by the same kind of evidence as a bill. Before the 15 & 16 Vict. c. 86, the evidence on claims was exclusively by affidavit, unless the court otherwise

ordered. But the 15 & 16 Vict. c. 86, and the orders founded upon it, apply to claims as well as to bills; and therefore now it is conceived a party may support his case by affidavit, or by oral evidence, or by a mixture of the two; and the witnesses, and parties treated as witnesses, will be liable to cross-examination on their affidavits in the Examiner's Office, exactly as in the case of a suit commenced by bill.

No answers are or can be put in to a claim, whether the defendant has or has not appeared: if he wishes to support his case by evidence, he proceeds at once to file his affidavits, or examine his witnesses orally, as the case may be. The want of power to call for an answer was, indeed, before the 15 & 16 Vict. c. 86, one of the great defects of claims, because there was no method of obtaining discovery of documents effectually, or in fact of obtaining any satisfactory discovery. But the provisions of that act, and of the orders relating to production in chambers of documents on affidavit, apply as well to claims as to bills; and a plaintiff or defendant may now take out a summons in chambers before or after decree on a claim: (of the practice on this point I have already treated.)

The time within which, under the Orders of 1850, the parties should in strictness close their evidence, is fourteen days from the service of the claim. As a claim may be set down for hearing by the Registrar (on production of the Writ and Record Clerk's certificate of its being filed), immediately after service on the defendants of the copy claim, and it will then be put on the paper and heard in its turn, of course where the case requires much evidence, and especially if the examination of witnesses is oral, it will be generally impracticable for either party to close his evidence within the regular time; and either party desiring further time must apply, in the manner pointed out in the earlier part of this work.

Claims used to be heard as motions on the seal day, but that practice is abandoned, and claims are now treated for most purposes as causes, and are put in the regular list of causes and heard as such.

There is a difference as regards the practice of the bar between claims and bills. In a suit commenced by bill, senior counsel cannot, at the hearing, hold a brief without a junior, because there are pleadings in point of form to be opened, and senior counsel may not by reason of their dignity open pleadings. But on claims, there are, or at least on the defendant's side, no pleadings, strictly so called, and therefore it has become now the settled rule that,

on the hearing of a claim, a brief may be held by senior counsel without a junior.

Briefs, however, to senior and junior counsel will, nevertheless, be allowed in taxation of costs; and if the case is not a trivial one, it is usual and prudent, as in causes on bill, to instruct two counsel.

The Orders of 1850 provide for the diminution of the number of defendants on the record, by directing that, in the first instance, the only person who need be named on the record is the person against whom relief is directly claimed; and that when an executor or administrator of a deceased person seeks to have his personal estate administered, any residuary legatee, and the co-executor or administrator of the plaintiff, may be, in the first instance, sole defendants to the suit.

A trustee of real estate, and it would seem, of mere personal estate, cannot file a claim against his co-trustee alone, but must make some or one of the *cestuis que trust* parties.

The Orders of 1850 gave, however, power to the Master, proceeding under any order of reference, to summon before him such persons not parties to the record, to attend the proceedings, as he should think requisite; that power is now exercised by the judge through his chief clerk in chambers; and the plaintiff will be directed by an order in chambers to summon such parties as the chief clerk thinks ought to attend; and those parties are entitled to notice of all proceedings, and to attend upon them.

During the great prevalence of claims for a year and a half after the Orders of 1850, attempts were made to deal with very intricate cases by claim; but the court has, in several instances, checked this practice so effectually, that it is never now attempted, and therefore need not be discussed: (see on this point *Eccles v. Cheyne*, 15 Jur. 744; and *Jacobs v. Richards*, 18 Beav. 300.)

As the course which the court adopts, when a subject matter, not fit, in its opinion, to be dealt with by claim, is attempted to be so dealt with, is by dismissing the claim, and ordering a bill to be filed; and as in dismissing the claim it may do so with costs, it is obvious that now the practitioner will be incurring a very unnecessary risk who files a claim in any but the most simple cases, viz., such as are directly within the Orders of 1850, on *common* claims, or so near thereto as to be almost as simple.

It may here be mentioned with respect to what is excluded from the common claim *for administration*, that the common claim never applies when there is *real* estate.

When that occurs a *special* claim must be filed on that ground.

Claims may be, and indeed (as they are now scarcely ever used in contested matters), usually are, heard as short causes. To hear a claim as a short claim, counsel must certify, as in a suit commenced by bill, that it is fit to be so heard and then the claim may be at any time put into the short list, and will be heard as a short claim. Certain days are usually set apart in each of the courts for short claims, which are heard with or immediately after the short causes.

Before a claim is brought on for hearing, the solicitors on both sides should, as in the case of a bill, be provided, the plaintiff with an affidavit of having served the defendants with the copy claim, and of its having been set down to be heard; and the defendants with an affidavit of having been so served, for the same reasons, and with the same effects as I have pointed out in reference to the hearing of a cause upon bill. The appeal from a decree made on a claim is not by petition of appeal, but by motion on notice to the parties in the cause.

Of the proceedings by Summons in the first instance.

The proceeding by summons in the first instance is so extremely simple, that it requires little more than to refer to the act of 15 & 16 Vict. c. 86, and the General Orders thereunder

By the 45th section of the act, it is enacted, that a person who claims to be a creditor, or a specific or pecuniary or residuary legatee, or the next-of-kin, or some or one of the next-of-kin of a deceased person, may apply for, and obtain as of course, without bill or claim filed, *or any other preliminary proceedings*, a summons from judge's chambers, requiring the executor or administrator, as the case may be, of such deceased person, to attend before either the Master of the Rolls or any of the Vice Chancellors, at the option of the party taking out the summons at chambers, for the purpose of showing cause why an order for the administration of the *personal* estate of the deceased should not be granted.

And the 47th section provides, that any person claiming to be a *creditor* of a deceased person or interested under his will, may apply for and obtain, in a like summary way, an order for the administration of the *real estate* of a deceased person, when the whole of such real estate is by *decree vested in trustees, who are by the will employed to sell such*

real estate, and authorized to give receipts for the rents and profits thereof, and for the produce of the sale of such real estate.

The first section, therefore, includes only *personal estate*, in which creditors or legatees, or next-of-kin are interested, and the summons can only be against executors or administrators.

The second clause extends to *real estate*, but gives the right of summons only to *creditors*. So that persons *not creditors*, cannot proceed by mere summons in respect of *real estate*, but must proceed by bill or claim.

The form of the summons is given in schedule E. to the Orders of the 7th August, 1852.

The summons is obtained on an *ex parte* application from the judge's chief clerk, but it is signed by the judge. A copy of the summons is filed in the Record and Writ Clerk's Office, and a copy duly stamped at that office must be served on the executor or administrator, seven clear days before the return day: (5th Order of October, 1852.)

When the summons has been duly filed and served, then by the forty-fifth section of the act, on proof by affidavit of the due service, *or* on the appearance in person, or by his solicitor or counsel, of the executor or administrator, and upon proof by affidavit of such other matters, if any, as the judge requires, he may, if in his discretion he think fit, make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case may require; *and the order so made has the force and effect of a decree to the like effect, made on the hearing of a cause or claim between the same parties*; but the judge may grant or refuse such order, or give any special directions touching its carriage or execution, and in case of applications for any such order by two or more different persons or classes of persons, may grant the same to such one or more of the claimants as he think fit; and if the judge thinks proper, the carriage of the order may subsequently be given to such party interested, and upon such terms as the judge directs.

The order made is usually the common decree for accounts, which would be made in a bill stating no more than the claim shown by the title of the party taking out the summons, with, as authorized by the clause of the act just referred to. any special directions or inquiries that the judge may be satisfied by the applicant, ought to be included.

When made, all the subsequent inquiries and proceedings are just the same as they would be under such a decree in a

cause; the chief clerk makes his certificate on the result of the inquiries, as he would under an ordinary decree; the certificate is to be signed by the judge, and is open to objections before the judge and appeal at the time, and in exactly the same way as if it were made in pursuance of a decree in a cause. And further consideration may be reserved on the certificate, in which case the further consideration will be heard and dealt with in the same manner, as it would be in a suit instituted by bill. It is unnecessary, therefore, to pursue this portion of the subject into further detail.

Of Costs.

The subject of costs, although much has from time to time been said upon it incidentally in these pages, in treating of the different steps in a suit, requires some further notice.

Generally, the principle of the Court of Chancery is, that costs are in the discretion of the court, and will be dealt with, not according to the success or failure of the party, but according to the view which the court in its judicial discretion takes of his merits, other than, or in combination with, the mere merit or demerit of being, as regards the matters determined, right or wrong. But this principle does not prevent the court adopting, as a subsidiary rule, the holding the costs of a proceeding as properly to be given to the party who is right in his procedure. In *Millington v. Fox* (3 Myl. & Cr. 353), Lord Cottenham laid down the rule thus:—"The question of costs in Chancery is left to the discretion of the court; that discretion ought to be exercised as far as possible according to some principle. And I am very much disposed, as a general rule, to make the costs follow the result; because, however, doubtful the title may be, or however proper it may be to dispute it, it is but fair and proper that the party who really has the right, should be reimbursed, as far as giving him the costs of the suit can reimburse him. But then there is another object which the court must keep in view, viz., to repress unnecessary litigation and to keep litigation within those bounds which are essential to enable the parties to vindicate and establish their rights."

In that case, although the court gave the plaintiff a decree, yet, being dissatisfied with his conduct, it gave him no costs. The combination of the two rules makes the question of costs (always a very material one in Chancery proceedings, and sometimes much more material than the

original ground of suit), a matter of great difficulty and uncertainty.

There are, however, certain kinds of proceedings of which the costs are quite of course, and others in which they are almost so.

If a plaintiff, for instance, amends his bill by an order of course, after one defendant has answered, requiring a further answer, he pays him, as a fixed rule, twenty shillings costs; if he so amends after several have answered, requiring an answer from some defendants and not from others, he pays twenty shillings costs to each of those from whom he requires answers, and no costs to those from whom he requires no answers.

So, when there are several defendants who ought to join in one defence, such as trustees or executors, or any persons, in fact representing in a fiduciary character *one interest*, though the court will not compel them to join in defence, it will allow between them, as against the plaintiff, but one set of costs.

So, where an objection is taken by defendants by their answer for want of parties, and at the hearing, the court allows the objection, and the cause stands over to amend the bill, it is always on the payment by the plaintiff, to the defendants, of the costs of the day.

Of the mode of dealing with the costs of demurrers, pleas, and exceptions to answers, I have sufficiently treated in Chapter I.

Costs are divided into two principal classes; costs as between solicitor and client, and costs as between party and party: the latter being taxed with a greater degree of strictness than the former. They are also divided into costs payable by one party to another, and costs out of the fund the subject of litigation.

Costs as between solicitor and client are allowed to trustees, executors, and administrators, and other persons filling a *bonâ fide* fiduciary character, that is, as between them and their *cestuîs que trust*; for it must not be understood that if A. files a bill against B., to which B.'s trustees are necessary parties, and the bill is dismissed with costs, A. will have to pay the trustees costs *as between solicitor and client*; as to him, they are strangers, and will only get their costs, as between party and party, the court making provision for the trustees' extra costs, if it thinks fit, out of B.'s trust estate.

Costs as between solicitor and client are also sometimes allowed to all parties, in cases where all the costs are given out of the estate, the subject of litigation. But that, on

examining the cases, will be found to be done in general, only when the estate is absolutely or is substantially *the estate of all the parties*.

As to all other parties than trustees and fiduciary persons, litigating between each other, costs are only given as between party and party.

The exceptions to the rule of making the costs follow the result of the suit are numerous.

Thus, for instance, when an heir-at-law is made a party to a suit instituted for establishing a will, or for establishing a right to real estate, or generally when the heir-at-law is made a party to a suit in respect of his interest as heir merely, he will be entitled to his costs whatever may be the result of the suit, and that even though he cross-examines the plaintiff's witnesses; but it seems, if he brings the bill, and fails; or being made a defendant, examines his own witnesses, then he shall not have his costs (see *Luxton v. Stephens*, 3 P. Wms. 373; and *Bidolph v. Bidolph*, *id.* notes); the principle is that the heir has the title cast upon him, and cannot refuse it. Therefore, if he merely *defends* the title so cast upon him, he has his costs whether successful or unsuccessful. But if he, not being in possession, seeks to enforce his title, he must take the common fate of a plaintiff who fails.

So, when an heir-at-law is made a defendant to a suit to establish a will, and the proof is not clear, he is entitled as of course, to have an issue at law to try the validity of the will; and whether the verdict is for or against him he will, in general, be entitled when the cause comes back and is disposed of, to his costs of the issue as well as to his costs of the cause: (see *Wright v. Wright*, 5 Sim. 449; and Beames Costs, 94.) If, however, in a suit for establishing the will, he makes and argues any untenable point, and fails, he will not have his costs: (*Rashleigh v. Master*, 1 Ves. jun. 201.) The distinction between his defending and initiating proceedings is very clearly shown by *Webb v. Cloverden*, (2 Atk. 424.) In that case, the heir filed his bill charging fraud in obtaining the will, and insanity in the testatrix, and a trial was directed, and the verdict must have been against the plaintiff; the Lord Chancellor made him pay the costs so far as controverting the will; but said, if an heir-at-law were defendant, and an issue directed to try fraud or insanity, although the will should be sustained, the heir should pay no costs, and frequently would have his costs. But if even being a defendant, he sets up an iniquitous defence, as where a bill was filed to establish a will alleging that A.

was the heir-at-law, and he admitted he was, and defended and took an issue, and afterwards it turned out that he knew at the time the bill was filed that his elder brother had left children, and that they were living, he was refused his costs both at law and in equity: (*Roberts v. Scoones*, 7 Sim. 418.)

In a very recent case (*Roberts v. Kerlake*, W. R. 1854-5, p. 616), the heir-at-law, defendant in a *devisavit vel non*, had set up insanity in the testator, and the verdict was against him; Vice Chancellor Wood said, if the heir set up such a defence fairly, reasonably, and *bonâ fide*, he would not be deprived of his costs: in the case before him, the defence so set up was not of that description, and the heir-at-law did not have his costs.

So, in the case of vendor and purchaser, where the vendor, if he show a good title before the institution of the suit, and obtains a decree, is, in general, entitled to costs, yet, if he makes false representations, which fairly put the purchaser upon inquiry, and so occasion the suit, he will not have his costs; nor will he, if he has made the ground of his suit, contrary to the fact, that the purchaser has accepted the title: (*Sidebotham v. Barrington*, 5 Beav. 261.) Again, on the same principle (*viz.*, that if the plaintiff's own conduct renders the litigation necessary, though he obtains a decree, he shall not have costs) the court acted in *Blunt v. Cumyn* (2 Ves. sen. 331.) There, money was raised to fit out a privateer; thirty shares remained unsubscribed for at the time of the capture of some prizes, and the question was whether the defendants, who had bought those shares after the capture, had an exclusive right to them, or whether the other subscribers, the plaintiffs, were to be let in with them; the Lord Chancellor dismissed the bill; but because the act of the defendants in buying the shares after the capture might give occasion for the litigation, he dismissed it without costs.

Costs out of the Estate.

With regard to the cases in which the court gives costs out of the estate the subject of litigation, it is a rule almost without exception, that the general costs of a suit occasioned by the act of the party through whom all the parties claim, as in the case of suits to determine the rights of claimants under a will, the costs of all parties, without reference to their success, are paid out of the estate.

So, in creditors and other suits for the administration of

the estates of deceased persons, the general costs, that is, the costs of and incident to the administration, come out of the estate, and are the first charges upon it; that is, there is no division of the *corpus* till all the costs are paid; the result of which is, not unfrequently, there remains very little to divide. The broad rule as to administration costs is this: that the plaintiff has one set of costs, and each defendant or set of defendants representing *one distinct claim or set of claims* on the estate, that is, one share in the estate, has one set of costs. But if there are several defendants representing claims upon a share, they will have between them and the party whose share they partially represent as assignees of or incumbrancers upon it, but one set of costs out of the estate. Thus, when a bill is filed by the executor of a deceased person, under whose will three claim shares, and on each of the three shares there are charges making the incumbrancers necessary parties, the plaintiff will have one set of general costs, and the defendants three sets of general costs between them, and no more: (see on this point *Greedy v. Lavender*, 11 Beav. 417.) Though a plaintiff, claiming to be a residuary legatee, fails in a suit for administration, he will have his costs out of the estate, if the claim is set up on fair grounds: (*Turner v. Frampton*, 2 Coll. C. C. 331.)

So in *Johnston v. Todd* (8 Beav. 489), where a suit was instituted by persons claiming as next-of-kin, for administration, and upon a very complicated set of inquiries and facts, it ultimately turned out that they were not the next-of-kin: and that other persons not parties were, the court, considering the investigation necessary for the administration, gave the plaintiffs as well as other parties, their costs out of the estate.

Where the estate is ample for the costs, of course no difficulty arises. But sometimes it is not so: when that is the case, the executors' costs of the administration suit are paid in priority to those of the other parties: (*Tanner v. Dancey*, 9 Beav. 339.) In a creditors' suit for administration, after payment of the executors' costs, the plaintiff is entitled to be paid his costs out of the estate before any other payment: (see *Barker v. Wardle*, 2 Myl. & K. 818.) In that case the bill was by simple contract creditors to have the testator's estate administered and the debts paid. Under the decree several specialty creditors came in and proved debts to an amount exceeding the value of the assets received. The question was, whether the plaintiffs should receive their costs before the specialty debts, and Sir C. Pepys, M. R., gave the plaintiffs their costs out of the fund, as between

solicitor and client. So, in a previous case, *Larkins v. Paxton* (2 Myl. & K. 320), the same judge in a case of exactly the same character then laid down the rule that "it is contrary to reason and to the uniform practice of the court, that specialty creditors who come in to take the benefit of a suit instituted by a simple contract creditor, should throw the burthen of the costs of the suit upon the simple contract creditor, where the assets prove insufficient for the full satisfaction of their claim."

So, in *Wedgwood v. Adams* (8 Beav. 103), Lord Langdale said, "if through the exertions of a plaintiff, the court is enabled to distribute a fund, or if it makes a declaration of rights necessary for its administration, then, although the plaintiff may fail in the claim, the court will not permit other parties to carry off the fruits of his exertions, without defraying his costs out of the fund." But this argument was not allowed to prevail in a case in which one of the parties had taken proceedings in the Ecclesiastical Court necessary for establishing the will, and thus forming a foundation for the administration suit; the court would not treat those costs as equal or paramount to the costs of the executor, and postponed them.

But though, in general, the costs of all parties to a suit rendered necessary by the doubtful language of a testator's will, will be given out of the estate, yet, where parties had acted on an assumed construction of a will for nine years, and then some of them filed a bill to have the will construed by the court, the court, although thinking the case one of great doubt, and a very fit one to be tried, yet, on account of the long acquiescence, refused to give any costs out of the estate, and dismissed the bill simply, without costs.

The rule that the doubts created by a testator throw the costs on the general estate is thus modified: If a fund is separated from the bulk of the testator's estate, and then a question arises about it, *that fund* pays the costs. But if the question is who is entitled to the fund in the first instance, that question is raised by the testator himself, and his estate must bear the costs. Therefore, when a testator, by his will, gave a legacy to the trustees of the *London Orphan Asylum, in the City Road*, and two distinct charities claimed the legacy, the court gave the costs of both parties out of the general estate: (*Wilson v. Squire*, 13 Sim. 212.)

The order in which costs are paid out of the estate in an administration suit are well shown in the case of *Tipping v. Power* (1 Hare, 405.) In that case the plaintiff was a simple contract creditor, who was also an equitable mort-

gagee by deposit, and the bill was against the executors and devisees of the testator and the parties beneficially interested in the estate for administration ; the debts and the costs considerably exceeded the assets. It was held, that the plaintiff was, as equitable mortgagee, entitled to the proceeds of the sale of the mortgaged premises. Then, out of the general assets, the executors were first entitled to retain the debts due to them ; then, the costs of the executors, as between solicitor and client ; next, the costs of the plaintiff as simple contract creditor ; then, the costs of the defendants, the beneficiaries ; and lastly, the debts due to the plaintiff and other creditors.

But if a simple contract creditor, being informed by the legal personal representative, that there are no assets for the payment of simple contract debts (and that statement turns out at the hearing to be true), will institute a suit for administration, he will have to pay the costs of the suit : (*King v. Bryant*, 4 Beav. 460.)

I have stated that, in general, trustees, executors, and persons filling a fiduciary character will, as between themselves and their *cestuis que trust*, in any suit relating to the trust estate, be allowed their costs out of the fund as between solicitor and client.

This admits of several exceptions : 1st. Trustees, &c. who have misconducted themselves, will not, in general, have their costs. Thus, if executors institute a suit in itself unnecessary and improper, they will have no costs : (*Richard v. Attorney General of Jamaica*, 13 Jur. 197.) So where, in a creditors' suit, the administrator pending the reference for accounts became bankrupt, and it turned out that he was in default, it was held, that neither he nor his assignees were entitled to any costs : (11 Beav. 415.) And so if trustees, having sufficient information before suit, still put parties to a suit, instead of receiving costs they will pay costs. Thus in *Lancashire v. Lancashire* (1 De G. & Sma. 288), the plaintiff claimed as heir-at-law ; previously to the institution of the suit, he submitted to the trustees' defendants his pedigree and proofs ; and the court thought that they were such as ought to have satisfied the trustees of his heirship. And the court made the trustees pay the costs of the suit, including the costs of the genealogical evidence.

If, however, a defaulting trustee is ordered to pay the costs up to the hearing, and pays them, he will be entitled to his subsequent costs : (*Hewett v. Foster*, 7 Beav. 348.)

There are some distinctions, too, as to what is such default as to deprive trustees of their costs. There may be enough

to remove trustees, and yet not enough to deprive them of their costs ; thus, where trustees were removed because they filled a character incompatible with their duty as trustees, they were removed ; the bill contained charges against them of fraud, which were not proved, and they were held entitled to their costs : (*Passingham v. Sherborn*, 9 Beav. 424.) So, where an executor was charged with interest for a sum of money in his hands, prior to putting in his answer, and not thereby accounted for ; yet it was said he may often have his costs : (*Woodhead v. Marriott*, C. P. C. Rep. 62.)

And though, as I have stated, trustees appearing by different solicitors will not, in general, have more than one set of costs, yet, if they fill different characters, as in a case where A. and B. were trustees under one deed ; D. E. and B. were trustees under another deed ; and A. B. and F. were trustees under a will ; and B. E. and F. put in separate answers and appeared by different solicitors, they were all allowed their costs as between solicitor and client : (*Kampff v. Jones*, C. P. C. Rep. 13.)

The general rule is, that executors are entitled to have the guidance of the court on the construction of a will at all doubtful ; and of course to have their costs out of the estate ; but if they put the estate to the expense of a suit when the will is plain, they will not only have no costs, but be ordered to pay costs : (*Harvey v. Harvey*, 3 Jur. 919.) But where trustees resisted a claim by the assignee of the equitable interest in a term, on the ground that they were not trustees of it ; and the fact of their being so was not made out till the hearing, they were held entitled, not to costs merely as between party and party, but to trustees' costs.

And a trustee may be entitled to part of the costs of a suit, and made to pay other part. Thus, where there was a suit for charging a trustee with breach of trust, for neglecting properly to invest, and for accounts and ascertaining the rights of the parties generally, the trustee was charged with the costs of so much of the suit as consisted of inquiries showing in the result that he was in that particular liable for wilful default ; but he had his general costs of the suit.

In charity cases, trustees are simply refused costs, or made to pay them, according to the circumstances, though there have been breaches of trust.

In *The Attorney General v. Christ's Hospital* (4 Beav. 73), where the trustees and their predecessors had for a long course of years administered the funds erroneously ; but being called upon duly to administer them, they insisted on their own rights adversely and failed, they were made

to pay the costs, notwithstanding the usage of their predecessors. And see also, *Attorney General v. Drapers' Company* (4 Beav. 67.) But in that case it was said that if trustees have by accident, and without wilful default, committed an error, which they took the first opportunity to correct, and have not set up their rights adversely, the court will not charge them with costs, if there is a fund out of which the costs can be paid.

It would be useless further to multiply cases on the question of the right of trustees to costs, and how they may lose that right. The general rules to be deduced from a vast multitude of cases seem these :

I. That trustees, &c., will always have their costs, as between solicitor and client, out of the trust fund, if their behaviour has been consistent with the trusts.

II. That they may have their costs in many cases, if their conduct has been *bonâ fide*, even though the decree may be against them.

III. That when their conduct has been either greatly inconsistent with the trusts, or when they have rendered litigation necessary, by unnecessarily casting all discretion on the court, they will not receive, and will sometimes be made to pay, costs.

The next class of cases in which the rules about costs are somewhat special and important, are those of mortgagees and incumbrancers generally.

As between mortgagor and mortgagee, in a suit for foreclosure or sale, the mortgagee is, as a general rule, entitled to his principal and interest, *and costs*, in all cases, before the mortgagee can redeem, unless there has been in his conduct in the suit something extraordinarily reprehensible ; and that, even though some of the costs have been caused by the act of the mortgagee ; thus, a mortgagor's estate was held liable to pay the costs of a petition and order under the Trustee Act, for reconveying the mortgaged estate, although they were rendered necessary by the mortgagee having devised the mortgaged estate to three trustees, one of whom could not be found : (*King v. Smith*, 6 Hare, 473.) But where a mortgagee filed a bill of foreclosure, and pending the suit, transferred the mortgage to A. B. who transferred it to C. D., the extra costs thus occasioned were not thrown on the mortgaged estate : (*Coles v. Forrest*, 10 Beav. 552.)

If there are first mortgagee and several puisne mortgagees defendants, they are entitled to their costs in the order of

their priorities; that is, the first must be paid his debt and costs; then the second his debts and costs, and so on: (see *Upperton v. Harrison*, 7 Sim. 444, and the cases there cited.) This point should be clearly understood as well settled, as it is not uncommon to find practitioners confounding this kind of suit with administration suits, and supposing that the costs of all parties will, in the first instance, come out of the estate; and that then only will the mortgage debts and interest be payable in the order of their priorities; but the practice is as I have stated it, and if the principle of the rule is attended to, it will, at once, fix the rule in the memory. The principle is one of real property law, and not of mere procedure, and is this; that a mortgagee as against any *subsequent mortgagee*, is dealing with the representative of the *mortgagor*, that is, with the equity of redemption, and has a right to foreclose, unless he is redeemed by the mortgagor or the party who represents the equity of redemption, his principal, interest *and costs*.

But if a mortgagee, instead of being the plaintiff seeking to be paid, is defendant to a suit by a subsequent incumbrancer, to ascertain priorities, &c., and instead of insisting on being redeemed, or being dismissed with his costs, which he has a right to do, he consents to a sale, then he adopts and takes the benefit of the suit, and the costs of all parties must be first paid out of the fund, before any of the mortgage debts are satisfied: (*White v. Bishop of Peterborough*, Jac. 402.)

A mortgagee may also deprive himself of his right to costs by his misconduct. Thus, a solicitor, defendant to a suit for redemption, having taken a mortgage for his bill without any settlement of accounts, and having, after the bill was filed, caused great delay and litigation before any account could be got from him; and finally, his demand having been reduced, on inquiry, more than one-sixth, the court gave him his costs down to the answer; it made him pay the costs of the inquiry what was due from him, and as to the rest of the costs after the answer gave him no costs: (*Detillen v. Gale*, 7 Ves. 583.) So, if the mortgagor tenders the money before suit, and appropriates the money by paying it into the bank, and the mortgagee refuses that, he will have to pay the costs: (see the case of *Shuttleworth v. Lowther*, cited by the Lord Chancellor, 7 Ves. 586.)

And it is the same if a second mortgagee makes a tender of all that is due for principal, interest, and costs: (*Smith v. Green*, 1 Col. 555.) But the tender must be either of the specific sum due for principal and interest, and of all costs,

or of a greater sum than was due: (see *Roberts v. Williams*, 4 Hare, 129.) So in *Wilson v. Cluer*, 4 Beav. 214, where a mortgagor had tendered forty pounds, and ultimately it turned out, on taking the accounts, that before that tender, the mortgage was in fact paid off, and a balance was due from the mortgagee; he was ordered to pay the costs.

Before quitting the subject of mortgagees' costs we must notice those cases where a puisne mortgagee, or the assignees of an insolvent or bankrupt mortgagee, are made parties to a mortgage suit, and disclaim; as to when they will, and when they will not, be entitled to be dismissed with their costs, or be paid their costs by the plaintiff. The rule is now well settled, that a puisne mortgagee, or his assignees, if they disclaim before suit, will be dismissed with their costs; but if they do not disclaim till the answer, the plaintiff is entitled to bring them to a hearing, without paying their costs: (*Ohrly v. Jenkins*, 1 De G. & Sma. 543.) In *Lock v. Lomas*, 15 Jur. 162, the defendants, assignee of a party to the mortgage, swore by their answer, that before the bill was filed, they had offered to the plaintiffs to disclaim by deed all, &c., but that the offer had been refused by the plaintiffs, and by their answers they also disclaimed in the usual form; they were held entitled to be dismissed with their costs. The disclaimer by deed, or offer to disclaim by deed, must of course be proved as well as sworn to by the answer, if the plaintiff goes into evidence to prove the contrary. But if the plaintiff goes into no evidence, the answer may, as in *Lock v. Lomas*, be read as evidence.

The disposal of the costs of a suit for specific performance are sometimes a little complicated.

First, if the *vendor* files a bill for specific performance, and fails entirely, that is, if the certificate of title is against the title, and is upheld by the court, the bill will be dismissed *with costs*.

So, if the certificate is against the title, and the plaintiff does not except to it, and the reference of title was before decree, the defendant may obtain an order to dismiss the bill *with costs*. And in a case where the purchaser demurred to the vendor's bill for specific performance, and his demurrer was overruled; then he took objections to title in the Master's office, and a case was sent to law, and the court of law decided against him, but ultimately the bill was dismissed; the purchaser had not only his costs of the suit in equity, but of the proceedings at law: (*Forbes v. Peacock*, 12 Sim. 528.)

But if the bill is by the purchaser, and the defendant (the vendor) cannot make a title, the bill will be dismissed *without costs*. The reason of this distinction is that in the one case, that is, where the vendor files the bill, it is wholly the fault of the plaintiff that a decree cannot be made. In the other, where the vendor is a defendant, though the court can make no decree, it is the fault of the defendant that the court cannot do so, and therefore the court will not, though it dismisses the bill, make the plaintiff pay any costs to the defaulting defendant.

The decree of reference of title, in a suit by a vendor, always directs an inquiry, not only whether the vendor can make a good title, but when a good title was first shown. If the certificate shows that a good title was made before the institution of the suit, the decree for specific performance will be *with costs*; but if it shows that a good title was not shown till afterwards, then, although the plaintiff is entitled to a decree, he will, in general, have to pay the costs of the whole suit. But this is not a rule of inflexible application; the question always is, did or did not the objections which were removed for the first time in the Master's office occasion the suit? If the case is, that the duty which the vendor has undertaken, to make out a good title, is interrupted by some claim or demand on the part of the purchaser which cannot be sustained, and which gives rise to a suit, the consequence of which is, that something remains to be done which is not done until the suit gets into the Master's office, but which the vendor would have done without suit, if an opportunity had been afforded him; in such a case the fact of the title having been perfected in the Master's office does not determine the question of costs (*Scoones v. Morrell*, 1 Beav. 251); in which case the court, although the title was not made out till it went into the Master's office, made the purchaser pay the costs of the suit.

A purchaser may make a fair objection to title without having to pay costs. Thus, in *Aistabie v. Rice* (3 Mad. 256), where the objection was whether a power of limitation and appointment was a springing use, or an executory devise, or a mere power to appoint by way of contingent remainder; and there were also other questions; the court directed a case, which was twice argued, and ultimately the Court of Common Pleas gave its certificate in favour of the plaintiff. The court thereupon directed specific performance, but without costs.

But it must be a substantial and fair objection. So that when a purchaser took an objection founded upon an attempt

to distinguish the case from those subject to a well settled rule, which distinction the court thought wholly without foundation, he was made to pay the costs: (*Bishop of Winchester v. Paine*, 11 Ves. 194.) If both parties have relied upon untenable grounds, although a specific performance is decreed, it may be without costs: (*Sidebotham v. Harrington*, 5 Beav. 261.)

The general rule is undoubtedly that the court will not compel a purchaser to take a doubtful title: (see Sug. Cone. View, 280, 281.) In such cases the court will, in general, dismiss the bill without costs, and expressing no opinion on the title: (*Willcox v. Bellairs*, Turn. & Russ. 491.)

It is a settled rule that the Crown never *pays* costs. But the Crown may or may not receive costs. The Crown may receive costs in a case in which, had it been a private person, he could not have been made to pay costs. But if, being a private person he might have been made to pay the costs, then he cannot receive costs. Thus, in *Attorney General v. Corporation of London*, where exceptions were taken to the answer by the Attorney General proceeding *ex officio*, the Master allowed the exceptions, and the Master of the Rolls affirmed his decision, and overruled exceptions to the Master's report, with costs; then the defendants appealed against the decision of the Master of the Rolls, and the Lord Chancellor, dismissing the appeal, included in the appeal the question of costs, on the ground that it was a case in which, if it had been the case of a private individual—being in possession of the Master's decision—he could not have been made to pay costs: (*Attorney General v. Corporation of London*, 2 Hall & Twells, 1.) (1)

Some of the cases in which the Crown has been refused costs, seem inconsistent with the rule thus laid down by the Lord Chancellor. Thus, in *Burney v. M'Donald* (15 Sim. 6), the suit was by the testator's trustees to have the rights of the parties ascertained, and the Attorney General was made a party in respect of a trust alleged to be created for an alien. The court decided the rights, excluding the claim of the Crown, and gave to all parties, except the Crown, their costs out of the estate; but to the Crown no costs. Now this was a case in which it is clear

(1) This applies only now to suits instituted before the 18 & 19 Viet. c. 90; as to suits instituted since that act, the Crown may pay and receive costs as a subject would.

that if the Attorney General had been a private person, he could not have been, under any circumstances, made to pay costs. In *Perkins v. Bradley* (1 Hare, 219), the case was different: there the Crown, in a suit for enforcing the claims of a purchaser for valuable consideration against the trustee of the vendor and the purchaser, insisted on its title against the purchaser, on the ground that the vendor was a felon convict, and failed; and Sir J. Wigram refused to give the Attorney-General his costs. In that case, it is clear, that if the claim had been by a private person so failing, he might have had to pay costs, and therefore, on the principle laid down by the Lord Chancellor, he could not receive costs.

In charity cases the court is, in general, more lenient on the subject of costs than in ordinary cases. Thus, in a case where there had been misapplication of the funds of a charity for a long time, on a wrong construction of the deed, but no imputation on the trustees, and it was not contended that the misapplied fund should be brought back, the court, although removing the trustees, allowed their costs out of the fund: (*Attorney-General v. Drummond*, 2 Con. & Law, 98.)

So, in *Attorney-General v. Caius College* (2 K. 150), there had been long misappropriation, that is, for two centuries, but no improper motives in the trustees, and they had, by their economy, effected considerable accumulation of the funds; the court would not remove them, and gave them their costs out of the fund.

So, in a case where a lease had been granted for ninety-nine years of a charity estate, which would be bad without proof of its being for the charity, the court, under circumstances of long possession permitted, and that the defendant was only the representative of the lessee, set it aside without costs, the defendant making no further opposition: (*Attorney-General v. Owen*, 10 Ves. 555.) It is true the court said it was to be no precedent; but the course of the court, since, has been consistent with that case.

Relators, in general, have their costs, charges, and expenses: (*Attorney-General v. Corporation of Winchester*, C. P. Coop. 502.) But if the relief obtained on an information might have been obtained on petition, *semble*, the court will give no costs to the relators: (*Attorney-General v. Holland*, 2 Y. & Col. 683.) So, in *Attorney-General v. Berry* (11 Jur. 114.) And if the information is altogether wrong and causeless, the relators will have to pay costs: (*Attorney-General v. Smart*, 1 Ves. 72.)

It seems scarcely necessary to say that parties guilty of improper conduct, or vexatious or improper proceedings in the cause, may be liable to pay costs in respect of such conduct. Thus, in a cause heard on original bill and bill of revivor, the defendants had a decree against them with costs; but the bill of revivor improperly stating the facts of the original bill at great length, the plaintiff had to pay the costs occasioned by that course of proceeding, and the Taxing Master was to settle the amount: (*Horsley v. Fawcett*, 11 Beav. 565.) So, where a suit was instituted to remove trustees, charging them with fraud and all kinds of misconduct, all of which charges failed; though the trustees were removed, but not on the ground of misconduct, and so far the bill was right, the plaintiff was made to pay the costs: (*Passingham v. Sherborn*, 9 Beav. 424.)

And if a plaintiff goes into a great deal of unnecessary evidence, although he obtains a decree, he will only get costs up to replication: (*Harvey v. Mount*, 8 Beav. 439.)

So, in petitions, if they are of vexatious length, the court has directed the Master, on taxing the costs, to have regard to the length: (*Cunning v. Bell*, 13 L. J. 304, Ch.) What is improper length in a petition is not an easy matter to determine. It is generally received, however, in practice, that petitions should not set out *verbatim* clauses of public acts, nor long clauses of deeds.

When costs are vexatiously occasioned by the party having the right, so that, though deciding for him, the court will make him pay those costs, it sometimes will itself make provision for them, sometimes will leave it to the Taxing Master. When the matter can be clearly distinguished in the proceedings before the court, it will at once make provision for the costs thus to be paid by the successful party. If it cannot distinguish, it will be left to the Master, (*Farrow v. Rees*, 4 Beav. 18.)

Where a plaintiff moves for production of documents, and payment of money into court upon the answer, the possession of both being admitted, he ought to make but one motion. If he splits the matter into two motions, he will have to pay the extra costs occasioned (*Hawke v. Kemp*, 3 Beav. 288); and if a party, moving for production on the answer, chooses to mix up in the motion matters as to which the right of production is clear, with other matters which are in contest, and fails in the latter, although he gets an order for some production, he will pay the costs of the motion: (*Murray v. Walter*, Cr. & Phil., see p. 114.)

Security for Costs.

In certain cases, a plaintiff will be obliged to give security to the defendants for the costs which may be payable by him. A plaintiff *living abroad* is, in general, required to give security for costs; and in a case where a plaintiff gave up his house in England, and resided abroad, as he stated, *for a temporary purpose*, but left it ambiguous whether and when he intended to return, he was considered so far living abroad as to be required to give security for costs: (*Kennaway v. Tripp*. 11 Beav. 588.)

A plaintiff ought, in the bill, to be described so that the defendant may know where to find him. The description should, or may, be of his habitual or best known place of residence; it need not be of the place where he is actually for the time when the bill is filed. Thus, in *Hurst v. Padwick* (12 Jur. 21), where the plaintiff had long lived at Horsham, and had property there, and in a bill filed in September described himself as of Horsham, but had sold his property and left Horsham in August, and had, in September, no fixed place of residence, the court refused to require security for costs. In *Sibbering v. Balcarras* (1 De Gex & Sm. 683), the plaintiff described himself "as formerly of Blackwood, in the county of Lancaster, but now working on the line of railway between Sheffield and Manchester, labourer," the court thought the description insufficient, but doubted whether it was a proper case for security for costs, or whether it should not have been met by demurrer. The motion stood over to amend.

But if a plaintiff, whose description is correctly given in the bill, changes his residence frequently after the filing of the bill, he will be ordered to give security for costs: (*Player v. Anderson*, 15 Sim. 104.) If a plaintiff, ordered to give security, gives an insufficient security, he will be ordered to give another within a limited time, and if he does not do it then, a peremptory order will be made that he shall do so within a further limited time, and if default made, that the bill should stand dismissed with costs: (*Giddings v. Giddings*, 10 Beav. 29.) In this case the time fixed was six months. And where the surety for costs of a plaintiff residing abroad, became bankrupt a few days after a decree dismissing the bill with costs, the court would not allow a petition of rehearing presented by the plaintiff to go on until he had found a new surety: (*Lautour v. Holcombe*, 1 Phil. 262.)

Security for costs, on the ground of residence abroad.

will only be required where such residence is voluntary, that is, where it is not a compulsory incident of duty. Thus, security for costs will not be required of a seafaring man (*Gowran v. Barnett*, Sau. & Sc. 651, note), nor of a surgeon in the army residing abroad with his regiment (*Wright v. Everard*, *ibid.*), nor of a naval officer on half-pay, residing in a colony and there holding an official appointment (*Evelyn v. Chippendale*, 9 Sim. 497), nor of a colonial judge residing as such in one of the colonies: (*Thornton v. Wilson*, 1 Hog. 20.) But an officer on half-pay, resident abroad, and not holding any appointment requiring his residence abroad, is not exempted: (*Long v. Tottenham*, 1 Irish Chan. Rep. 127.)

It seems scarcely necessary to say, though the point has been the subject of discussion and decision, that a plaintiff may, instead of security, deposit money. To fix the proper amount was referred to the Master; probably the court would now at once do that in court; if not, it would be referred to chambers, and there be fixed by the chief clerk: (*Fellowes v. Deere*, 3 Beav. 353.)

If a plaintiff, originally resident in this country when he filed his bill, goes abroad to attend to his affairs, and not to avoid his creditors, and with intention to return, he will not be ordered to give security: (*Horne v. Thompson*, Sau. & Sc. 622.)

But if a party ordered to pay costs goes abroad, and it is shown to the satisfaction of the court that he has gone abroad to avoid the payment, he will be ordered to give security for costs, and proceedings in the suit will be in the mean time stayed: (*Busk v. Beetham*, 2 Beav. 557.)

Of course, if a plaintiff on the face of his bill *misstates* his place of residence, he will be ordered to give security for costs: (*Sandys v. Long*, 2 Myl. & K. 48.)

Taxation of Costs.

The taxation of costs in suits is of course: a direction to tax forming always part of the decree or order. When matters have arrived at that stage of the cause, that a provision for the costs can be made, the reference to tax is now to the Taxing Masters, who perform all such duties as were before referred to or performed by the Masters in Chancery in relation to the taxation of costs; and have, in such matters, all their powers and authorities to administer oaths, to examine witnesses and parties, to order the production and inspection of books, papers, and documents, to proceed *de die in*

diem to make separate reports and certificates, to require that any party be represented by a separate solicitor: (9th Order, 1842.)

The references are made to the Taxing Masters in rotation; or, if there has been any former taxation in the same cause or matter, then to the Taxing Master before whom such former taxation has taken place: (10th of same Orders.)

The taxation is practically carried on thus: the solicitors of the parties in the cause take into the office of the Taxing Master their bills of costs copied on foolscap, with a margin, and a copy of the decree. The clerk will then get the name of the Master in rotation marked on the bill of costs. The bill of costs is then left with the clerk of that Master, and a warrant to tax taken out, which must be served on the other parties.

I have already observed that there are two modes of taxing costs, one as between solicitor and client, the other as between party and party. The minutiae of the difference between these two methods of taxation are a species of law only known in the Taxing Masters' offices, and to a few very experienced solicitors, and are too minute to be subjected to any general rule. All that can be said upon it as a guide is this, that in taxing, as between party and party, there are certain fixed proceedings for which charges may be made by the solicitor of a fixed amount, and no more than that amount will be allowed to be charged against the party having to pay costs, under any circumstances. Thus, for the instructions for a bill, the one pound fourteen shillings of schedule A. of the Orders of 7th August, 1852, and no more, will be allowed, whether the preparation of those instructions was very difficult, and occupied three days, or whether they consist of a page, and occupied as many hours. So, in the taxation as between party and party, if the solicitor thought fit, under the old practice, to pay to counsel for settling a bill more than two guineas for thirty folios, three guineas for sixty folios, and so on, he would not be allowed the excess in taxation as against his opponent. Under the new system of pleading, the length of pleadings being so much diminished, and their difficulty increased, this rule is obviously inapplicable, and I believe in practice the Taxing Masters do not adhere to it.

In taxation, as between solicitor and client, every charge that a solicitor might fairly make and be allowed in a matter purely between himself and his client, that is, in a matter not in court, will not as a matter of course be allowed. Thus, to take an instance quoted by Mr. Daniell, p. 1311,

from Mr. Smith's original work, where a defendant, by his own delay, allows himself to be put in contempt, although clearly his solicitor would, as against him, be entitled to charge the costs incurred, the defendant would not, in taxation, as between solicitor and client where the costs are to be paid out of a common fund, be allowed those costs out of the fund. The taxation as between solicitor and client is, in fact, somewhere between the taxation as between party and party, and what it would as between a party disputing his solicitor's bill, and his solicitor.

And here I may, in passing, notice a point of costs arising under the new practice, recently settled, viz., the costs that will be allowed for fees to counsel acting as special examiner. The rule laid down by the Master of the Rolls in a recent case, not reported, is this:—No fee will be allowed to counsel for perusing the pleadings laid before him, under the 31st section of the 15 & 16 Vict. c. 86. The fee to be allowed for examining, is five guineas for each sitting; and it is understood that a sitting means the period during which the court is accustomed to sit, viz., five hours, unless the whole examination is completed in less time, in which case the sitting would of course be a complete sitting, and the fee of five guineas would be allowed in taxation. This rule is understood to apply to sittings in London, and to refer to taxation as between party and party. Whether for sittings in the country at any distance, or on taxation as between solicitor and client, any larger fee would be allowed, is unsettled.

Upon the general practice of what is allowed in taxation, either as between party and party, or between solicitor and client, for fees paid to counsel with briefs (a very material question always to the solicitor), there is no fixed rule; as the fees which will be allowed depend much on the nature, importance, and difficulty of the suit. It may, however, be safely assumed that even as between party and party, one guinea for three brief sheets to leading counsel, and two thirds or three fifths of that to junior counsel, will be allowed.

For fees to counsel on the hearing on further consideration, although the original brief is always delivered with the new brief, and, although, in practice, it is necessary for counsel to read the original brief, whether he held it or not, yet, in taxation of costs, no fee to counsel with the original brief is allowed; but a fee somewhat larger than that due to its mere length, will be allowed on the brief on further consideration.

In taxation, as between party and party, the Taxing Master may allow to the party entitled to receive such costs, all such just and reasonable expenses as appear to have been properly incurred in—

The service and execution of writs and the service of orders, notices, petitions, and warrants.

Advising with counsel on pleadings, evidence, and other proceedings in the cause, procuring counsel to settle and sign pleadings and such petitions as may appear to have been proper to be settled by counsel, procuring consultations with counsel, procuring the attendance in the Master's office upon questions relating to pleadings or title: (this is of course nearly obsolete, and as applied to procuring the attendance of counsel before the judge in chambers, it will be subject to the 56th Order of October, 1852.) Procuring evidence by deposition or affidavit, and the attendance of witnesses, and supplying counsel with copies of, or extracts from, necessary documents: (120th Order, 1845.)

As to what scale or amount of fees to counsel for attending the judge in chambers will be allowed, there is no very settled rule.

Under the 10th of the Order of June, 1850, in all proceedings before the Master when he is attended by counsel, the allowances on the taxation of costs, in respect of the fees to such counsel, are to be regulated upon the same principle as if the proceedings were before the court. And this principle, I believe, is considered to be applicable in taxing, in reference to the attendance of counsel before the judge in chambers. But as the proceedings in chambers are very different from those in court, that is, as summonses have to be frequently adjourned from day to day, whereas causes rarely require that, it is not an easy matter to apply the rule.

The payment of costs, whether by a party to the cause, or a person not a party but ordered to pay, may be enforced either by attachment under the 11th and 15th Orders of August, 1841, or under a writ of *fi. fa.* or *elegit*, in pursuance of the Orders of 10th May, 1839. To obtain such payment, the party entitled, when he has obtained the Taxing Master's certificate of costs, and filed it, and procured an office copy, if the party liable, on application, refuses or neglects to pay the costs, issues a subpoena for costs, and serves it upon him personally, at the same time demanding the costs. If the party liable to pay makes default, an attachment issues against him as of course. The execution of the attachment is the same as of an attachment for default

of appearance, of which I have treated in a preceding part of this work.

The other mode of enforcing payment of costs, under the Orders of 1839, by *feri facias*, or *elegit*, and *venditioni exponas*, is pursued in the same manner as in enforcing the payment of any other money ordered to be paid by a decree or order of the court, of which course of proceeding I have also already treated.

Payment into and out of Court.

One of the most frequent steps required during the progress of a suit, for the protection of the funds in litigation or for other reasons, is the payment or transfer of money or stock into court.

Payment into court will, in general, be ordered where the party holding the money admits that he has it in his possession, and admits the title of the plaintiff to it wholly or partially, that is, admits his title to have it secured. Thus, all persons who admit the possession of money, and admit that they are clothed in respect of it with a character directly or indirectly fiduciary, will, in general, be ordered, pending the litigation, to pay it into court.

With reference to the essentials for supporting a motion that a party may pay money into court, that is, for obtaining payment into court before decree, the new procedure under the 15 & 16 Vict. c. 86 and the Orders, does not seem to be materially different from the old procedure. Such a motion must proceed entirely upon the answer; and therefore, whenever a bill is filed with a view to secure as well as to adjudicate upon the right to any sum of money, interrogatories should be filed, and an answer required.

Money will not be ordered to be paid in by a defendant, unless the plaintiff's title is clearly admitted by the answer; it need not be an absolute admission of title, but an admission shewing a high probability of title. In the case to which I shall refer, the plaintiff alleged herself to be next-of-kin to A. the defendant: the trustee for the next-of-kin admitted he had been informed, and believed, that the plaintiff had claimed for ten years to be one of such next-of-kin, but that, on inquiry directed by the court, she had failed to make out her claim; and he denied belief that she was sole next-of-kin. He admitted the possession of the trust fund. The court held there was no sufficient admission: (*M-Hardy v. Hitchcock*, 11 Beav. 73.) So, in *Dubless*

v. *Flint* (4 Myl. & Cr. 502), the plaintiff asserted his title as heir-at-law of A., of whom the defendant was a trustee. The defendant said he did not know whether A. left the plaintiff her sole heir-at-law, or whom she left her heir-at-law; and Lord Cottenham refused a motion for payment of money into court.

The answer must also clearly admit the receipt or possession of the money, and the admission must be of a clear sum, that is, if the defendant admits he has money, but does not say how much, or if he admits, what is the same thing in effect, that he has received moneys, and made payments, and does not admit a specific balance, a motion cannot be sustained. Thus, in *Freeman v. Fairlie* (3 Mer. 32), the defendant admitted that the trust funds remained vested in the public securities in India, either in his name or in the name of his house of business, but which, in particular, he could not set forth, but subject to his disposal, *unless some part of the produce is in the hands of the said house at interest, which he apprehends may be the case*. The court somewhat indignantly said, there was not an admission of possession of the money in his hands sufficient to order payment into court.

In *Boschetti v. Power* (8 Beav. 98), *Power*, *Anriol*, and *Shea* were called upon to transfer into court a specific sum of consols, being trust money alleged to be standing in their joint names. *Power* admitted it was standing in the names of the three; the two others admitted that there was a *large sum* standing in the three names, but did not specify the amount.

The court held there was not a sufficient admission, and refused the motion.

The motion must be grounded on the admission alone; the plaintiff cannot produce evidence to contradict, or even to explain, the answer. Thus, in *Boschetti v. Power*, the plaintiff tendered evidence to supply the defect of the answer, consisting of affidavits of the two defendants themselves sworn in another matter in the same suit, and an affidavit by the plaintiff's solicitor, that he had inquired, and been informed, by the chief accountant of the Bank that there was the alleged sum standing in the names of the trustees. But the court refused to proceed on anything but the answer, and refused, as we have seen, the motion.

So, the same doctrine was finally well established in *Edwards v. Jones* (1 Phil. 501), and to its utmost extent, going so far as this, that even when the answer neither admits nor denies facts relating to the *title* of the plaintiff,

but ignores them, evidence by affidavit cannot be let in to supply the defect. That was, it is true, a case of production of documents; but the rule as to obtaining payment of money into court upon the answer, has always been at least as stringent against the plaintiff, as that on production of documents.

The persons against whom such motions are most frequently made are trustees, executors, and other persons in a fiduciary character. But it is not in every case where there is a trust, that the money will be ordered into court. Thus, though a party, having a contingent interest in a fund, has in a proper case a right to have it brought into court; yet, where in such a case there was no allegation or pretence of danger, and the plaintiff owed a debt to the estate, which more than covered his interest, and other *cestuis que trust* resisted the application, the court refused to order the money into court: (*Ross v. Ross*, 12 Beav. 89.) Nor will the court order money into court which an executor swears by his answer he has retained in satisfaction of a debt due to him from the testator: (*Middleton v. Poole*, 2 Col. 236.) But in *Bartlett v. Bartlett* (4 Hare, 631), where the plaintiff was entitled only to a contingent interest in a sum, in which others were interested, and opposed the motion, and without allegation of danger, the court ordered the whole sum to be brought into court.

But if a trustee has had a fund in his hands, and has misapplied it by improper investment, or otherwise, he will be ordered to bring it into court. Thus, in *Hinde v. Blake* (4 Beav. 597), where an administrator admitted in his examination before the Master, that he had possessed himself of stock belonging to the intestate, and said he had since sold it out, and obtained and taken "in lieu thereof other securities or property," but without saying what, the Master of the Rolls ordered the transfer of the sum into court, giving the defendant time to say in what he had invested the money, and to call it in. So, in *Bourne v. Mole* (4 Beav. 417), two sureties being authorized to invest money on good security, one of them received a sum of one thousand five hundred pounds, and invested it in his own name on mortgage of leasehold property, of which he was the lessee; the property was of insufficient value, and being sold only produced two hundred and fifteen pounds. The court would not determine the right of the defendant so to invest on motion, and ordered the money into court.

The practice applies as well to implied, as to actual trustees. Thus, in *Leigh v. Macaulay* (1 Y. & Col. 260),

it was held, that if once a Court of Equity traces out trust money in the hands of a person who has not *primâ facie* a right to hold it, the money will be brought into court. So, where there was a bill for specific performance by the vendor, and the auctioneer who had a considerable deposit in his hands was made defendant, the court held, on a motion for paying the money into court, that the auctioneer being a mere stakeholder, the court would secure the stake pending the litigation, and deducting the amount of the auctioneer's claim, he was ordered to pay the rest into court: (*Yates v. Fairbrother*, 4 Mad. 23.)

As between partners, too, sometimes in suits for winding-up partnerships, or taking the accounts of dissolved partnerships, money in the hands of one partner will be ordered to be brought into court.

In general, a partner, insisting by his answer that the balance of the account is in his favour, is not obliged to bring into court what is in his hands; but, if he has received money contrary to good faith, he will be ordered to bring it in. Thus, in *Foster v. Donald* (1 Jac. & W. 252), the partners having agreed to dissolve, one of them, under pretence of going to London to consult friends, went round to customers and collected debts due from them; he was ordered to pay in what he had received.

So without any fraud, under circumstances, the money in the hands of a partner may be ordered to be brought into court. Thus, where a partnership of A. and B. was dissolved and succeeded by that of B. & C., who took upon themselves to adjust the affairs of the former partnership; B. died, and his executors filed a bill against C. for an account of the partnership dealings of B. and C. The court having directed an account of both partnerships, and C. admitting, by his answer, that he had received money on account of the partnership of A. and B., it was held, that he must pay that money into court: (*Toulmin v. Copland*, 3 Y. & Col. 625.)

When purchase money will be ordered to be paid in in suits for specific performance, is rather a question arising on the law of vendor and purchaser, and the nature of the particular contract, than one of practice.

The proceeding for obtaining an order to bring money or stock into court, is by motion on notice; and all the parties interested in the fund ought to be before the court. When the order has been obtained, it must be served on the defendant personally, and if the party on whom it is made refuses or neglects to obey it, he will

be liable to process of attachment, as in the case of any other order.

The solicitor of the party ordered to pay the money in, and desiring to comply with the order, pursues the same course as that already pointed out in reference to other kinds of orders for paying in money.

Executors and trustees, desiring to free themselves from the liabilities arising out of the possession of the trust moneys, may, in certain cases, pay them into court under the Legacy Act, the 36 Geo. 3, c. 52, s. 32, or the Trustees Relief Act, the 10 & 11 Vict. c. 96.

The former act enacts, that when by reason of the infancy, or absence beyond seas of any person entitled to any legacy, or to the residue of any personal estate, or any part thereof, chargeable with the legacy duty, the person or persons having or taking the burthen of any will or testamentary instrument, or the administration of such personal estate, cannot pay such legacy or some part thereof, although they may have the same in their hands, such persons may pay such legacy or residue, or any part thereof, after deducting the duty chargeable thereupon, into the Bank of England, with the privity of the Accountant-General, to be placed to the account of the persons or person for whose benefit the same shall be paid; for payment of which money, the Accountant-General is to give his certificate, as usual, on production of the certificate of the Commissioners of Stamps that the duty thereon has been duly paid; and such payment is to be a sufficient discharge for the money so paid in, provided the duty be also paid; and such money, when so paid in, is directed to be laid out by the Accountant-General, without any formal request for that purpose, in the purchase of three per cent. consols, which, with the dividends thereon, are to be transferred and paid to the persons entitled thereto, or otherwise applied for their benefit, on application to the court by petition or motion, in a summary way.

For paying *money* in under this act, no order is requisite; for transferring stock, an order, which will be of course *ex parte*, is requisite.

The executor may retain his costs out of the interest, and pay in the balance.

IV. *Of Service*

In causes regularly conducted, and in matters not requiring *personal* service, the usual and sufficient service of all proceedings requiring service is on the solicitor of the party at his place of business.

The 17th Order of 1842 prescribes that every solicitor of a party suing or defending by a solicitor, shall cause to be indorsed or written upon every writ which he shall sue out, upon every information, bill, demurrer, plea, answer, or other pleading or proceeding, and all exceptions which he may leave with the Clerks of Records and Writs to be filed, and upon all instructions which he may give to the Clerks of Records and Writs for any appearance or other purpose, his name and place of business, and also (if his place of business shall be more than three miles from the Record and Writ Clerks Office), another proper place (to be called his address for service), which shall not be more than three miles from the said office, where writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications may be left for him. And where any such solicitor shall only be the agent of another solicitor, he shall add to his own name or firm and place of business the name or firm and place of business of the principal solicitor.

By the 19th, where a party sues or defends by a solicitor, and no address for service of such solicitor shall have been indorsed or added, pursuant to the directions of the 17th Order, all writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications not requiring personal service on the party to be affected thereby, and which have heretofore been served upon the sworn clerks or waiting clerks, shall, unless the court shall otherwise direct, be deemed sufficiently served upon the party if served upon his solicitor at his place of business; but if an address for service of such solicitor shall have been indorsed or added as aforesaid, then all such writs, notices, orders, warrants, rules, and other documents and written communications shall be deemed sufficiently served upon such party if left for his solicitor at such address for service.

The 20th requires that a party proceeding in person shall indorse his name, residence, and address for service on all proceedings.

And the 21st, that when the party sues or defends in person, and no address for service of such party shall have been in-

dorsed or written, pursuant to the direction of the 20th Order, and in cases where any party has ceased to have a solicitor, all writs, notices, warrants, rules and other documents, proceedings, and written communications not requiring personal service upon the party to be affected thereby, shall, unless the court shall otherwise direct, be deemed to be sufficiently served upon the party, if served upon him personally, or at his place of residence; but if an address for service of such party shall have been indorsed or added as aforesaid, then all such writs, notices, orders, warrants, rules and other documents, proceedings, and written communications shall be deemed sufficiently served upon such party, if left for him at such address for service.

All services not requiring personal service must be served before eight o'clock in the evening, otherwise it shall be deemed service on the next day, excluding Sundays: (22nd Order.)

When a solicitor has caused an appearance to be entered, or an answer, demurrer, plea, or replication to be filed, he must, on the same day, give notice thereof to the solicitor of the adverse party, or to the party himself if he acts in person: (23rd Order.)

Where exceptions for scandal or insufficiency are filed, notice thereof must be given, the same day, to the solicitor of the adverse party, or to the party himself: (24th Order.) Exceptions for impertinence are, as we have already had occasion to notice, abolished by the 15 & 16 Vict. c. 86, s. 17.

Service of a bill or claim substituted for the service of subpœna to appear and answer, is by serving a printed copy of the bill or claim, with the indorsement prescribed by the 15 & 16 Vict. c. 86, s. 3.

A copy of an amended bill or claim, whether upon an amendment by a reprint, or by such alterations and additions as mentioned in the 7th Order of August, 1852, is to be served on the defendant or his solicitor, and the copy must be stamped with the proper stamp by the Writ and Record Clerk: (9th Order, August, 1852.) And whenever, under the old practice, service of subpœna to appear and answer on amended bill might be made on the defendant's solicitor, service on the defendant's solicitor of the printed copy is good service: (10th same Orders.)

When the defendant defends in person, service at his address for service is good service: (11th same Orders.)

Unless the court gives special leave to the contrary, there must be two clear days between the service of any notice of motion, or any petition, and the day named or appointed for

hearing the motion or petition. In the computation of such two clear days, Sundays and other days on which the offices are closed, except Monday and Tuesday in Easter week, are not to be reckoned: (16th Order, 1845, No. 47.)

The court will sometimes give leave, on *ex parte* application, to serve short notice of motion; that is, notice with less than two clear days between the notice and the hearing; when that is done, the notice must express on the face of it that it is by leave of the court, and should state the date of the leave, and the date for which the hearing is appointed.

Service of a bill has frequently to be made abroad.

By the 33rd Order of 1845, the court, upon application supported by such evidence as shall satisfy the court in what place or country the defendant is, or may probably be found, may order that the subpœna to appear, or to appear and answer the bill, may be served on such defendant in such place or country, or within such limits, as the court thinks fit to direct. And now the court orders the printed copy bill or claim to be served under this order.

The order limits such time (depending on the place or country within which the printed copy bill is to be served); after service of the printed copy bill, within which such defendant is to appear to the bill, and also (if an answer be required), a time within which such defendant is to plead, answer, or demur, or obtain from the court any further time to make his defence to the bill.

The 3rd article of the above Orders, prescribes that at the time when such subpœna shall be served, the plaintiff is also to cause the defendant to be served with a copy of the bill, and a copy of the order giving the plaintiff leave to serve the subpœna. As now the service of the printed copy has the same effect as service of the subpœna had, an additional copy of the bill is unnecessary; but a copy of the order giving the leave will be still requisite. Such an order is obtained on an *ex parte* application, supported by affidavits verifying the locale of the defendant; and the affidavit should also verify so much of the status of the defendant, with reference to the suit, as will explain to the court the nature of his interest and responsibility.

It is unnecessary to go into a recapitulation or analysis of the cases on this subject, as to the time the court will give; as it is entirely a matter of discretion, and the court limits always such a time as, having regard to the nature of the suit, the locality of the defendant, and the publicly known or proved state of the means of transit to and from that locality, it may deem to be reasonable.

Service of subpœna to hear judgment was, under the 16th Order of 1845, No. 45, to be within four weeks after publication had passed. As there is now no such thing as publication passing, the subpœna will be served within four weeks of the time when, under the orders of the court, the evidence is closed.

It must be served at least ten days before the return thereof, and is not to be returnable at any less time than one month from the teste of the writ. Service of it on the defendant's solicitor is good service: (26th Order, 1845.)

A copy of the subpœna should be served on each defendant, producing to him at the same the original.

When an injunction has been obtained, in strictness the party affected should be *personally* served with a copy of the writ of injunction. In practice, the party enjoined is rarely served with anything more than a copy of the order made by the court, and no writ is sued out.

In general, service of a decree or order should be by personal service of a copy, but in certain cases the court will permit substituted service. With regard to the service of summonses for attendances in chambers; by the 4th Order of 16th October, 1852, in cases of applications under the 15 & 16 Vict. c. 86, s. 45, applications for guardianship and maintenance of infants, originating in chambers, and of all other applications originating in chambers, a duplicate of the summons is to be filed in the Record and Writ Office; and in cases where service is required, the copies served are to be stamped in the manner provided by s. 46 of the act.

By the 5th Order, in cases where proceedings originate in chambers, the original summons is to be served seven clear days before the return thereof. All other summonses, not being summonses referred to in the second of the same orders, are to be served two clear days before the return thereof.

As service cannot be always effected upon the party who ought to be served, the court, in a variety of instances, allows, what is termed substituted service, that is, service upon some other person, which is to have the same effect as if the service had been upon the right person.

With regard to service of a printed copy bill or claim under the 15 & 16 Vict. c. 86, the act (5th section), expressly reserves to the court liberty to direct substituted service in such manner and in such cases as it shall think fit.

I have already, in treating of bills, discussed the cases, and pointed out the principle on which substitution of a

person to receive service in lieu of the right person is based, and it is unnecessary here to treat of it further, as every case subject to that general principle stands on its own circumstances.

Of Attachment generally.

I have already pointed out, that attaching a party is the principal practical step taken to compel a party to do that which, under the General Orders, or practice, or under special orders of the court, he ought to do; and I have pointed out many of the cases in which, and the mode in which, this process is applied. It remains to state some matters generally connected with the subject.

And first, as to when an attachment may and when it may not be issued.

An attachment issues, in general, against a party not appearing or not answering, or the like, in due time, as of course. But as against a married woman, leave must be obtained, and according to *Graham v. Fitch* (2 De Gex & Sma. 246), such leave cannot be obtained ex parte. Attachment under the 11th Order of 1841, is not the course, where a party upon a taxation not in a cause is found debtor to his solicitor; there the old practice must be followed: (*Re Lovell*, 9 Beav. 332.)

An attachment may issue against a minor ordered to convey, and if a party interferes to prevent his obeying the order, that is a contempt: (*Thomas v. Gwynne*, 8 Beav. 312.)

When an attachment is issued for want of an appearance, there must be, on obtaining it, an affidavit of service of the copy bill, and if for default of answer, an affidavit of service of a copy of the interrogatories. But the attachment is not bad because the affidavit on which it was obtained was made fifteen months before, unless something has occurred since which alters the state of the case: (*Wroe v. Clayton*, 16 Sim. 183.)

The affidavit must, however, be precise. An affidavit, therefore, of service of subpœna to appear and answer, which did not clearly show where the service was, was held insufficient, and an attachment obtained on such an affidavit was discharged: (*Bickford v. Skewes*, 9 Sim. 428.)

An attachment, though regularly issued, may be discharged, if the obtaining of it was against good faith, as where the defendant had reasonable ground for thinking that an answer would not be required without previous

intimation, attachments for want of answer were discharged, the defendants paying the costs: (*Siderfield v. Thatcher*, 11 Beav. 201.)

And when there was proof of the defendant's inability, by reason of illness, to put in his answer, proceedings of contempt were stayed: (*Hicks v. Lord Alvanley*, 9 Beav. 163.)

The effect of an attachment is generally to prevent the party from taking any active step till he has cleared his contempt. But a party against whom an attachment has issued for disobeying an order may move to discharge it: (*Brown v. Newall*, 2 Myl. & Cr. 558.) But if an attachment has issued against a defendant for want of answer, he cannot file an answer and demurrer (*Vigers v. Lord Audley*, 2 Myl. & Cr. 49), nor can he demur: (*Taylor v. Sheppard*, 1 You. & Col. 94.)

If an attachment is issued for costs, it does not deprive the party issuing it of any lien or right of set-off he may have for the payment: (*Bawbree v. Watson*, 2 K. 713; and *Davies v. Bush*, You. 358.)

When an attachment has issued, and the party has been taken, and is entitled to his discharge in consequence of the neglect of his opponent of some necessary step, and he remains voluntarily in prison, another attachment may be issued, and he will be lawfully detained under the second attachment: (see *Woodward v. Conebeer*, 1 Hare, 297; and *Miles v. Williams*, 9 Jur. 1030.)

The writ of attachment is prepared by the solicitor of the party seeking to issue it, or by the party himself, if he sues or defends in person: (16th Order of 1842; the forms are kept printed at law stationers.) The writ must be indorsed with the name and address of the solicitor, or of the party, if acting without a solicitor; and the nature of the writ is stated by indorsement on the back. It is to be presented to the Clerk of Records and Writs in whose division the cause is, and he seals it: when the writ is left for sealing, a præcipe must be left with it. The præcipe is a direction in writing to the Clerk of Records and Writs to seal the attachment. It states the title of the cause, the ground of the attachment, and the county into which it is to issue.

Of Taxation of Solicitor's Bills of Costs.

The taxation of a solicitor's bill of costs depends on the practice of the court, founded on its inherent jurisdiction, and on the provisions of the 6 & 7 Vict. c. 73.

Of the taxation of costs for the business done in a suit

under the ordinary practice of the court, I have already treated in discussing the subject of costs generally. But that portion of the subject relates only to the case of the costs payable by the adverse party, or out of a fund charged with the costs as between solicitor and client. There remains to be considered the rights of the solicitor and client, on the subject of costs as between themselves; for there are many charges which the solicitor may be entitled to make to his client in a suit, whether the costs are taxed as between party and party, or as between solicitor and client, and there is, in addition, the subject of bills of costs for business done either partly in a suit and partly not in a suit, or altogether not in a suit. In all these cases the solicitor's bill is, under certain regulations, liable to taxation.

The 37th section of the 6 & 7 Vict. c. 73, provides that no attorney or solicitor, nor any executor or administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month (which is by s. 48 to be a calendar month) after such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent to the party, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall be either subscribed with the proper hand of such attorney or solicitor (or in the case of a partnership by any of the partners, either with his own name or with the style or name of such partnership), accompanied by a letter subscribed in like manner, referring to such bill.

And upon the application of the party chargeable by such bill within such month, it shall be lawful *in case the business contained in such bill, or any part thereof, shall have been transacted in the High Court of Chancery, or in any other Court of Equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any court of law or equity*, for the Lord High Chancellor or the Master of the Rolls; and in case any part of such business shall have been transacted in any other court, for the Courts of Queen's Bench, Common Pleas, Exchequer, Court of Common Pleas at Lancaster, or Court of Pleas at Durham, or any judge of either of them, and they are hereby required, to refer such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee thereupon

to be taxed and settled by the proper officers of the court in which such reference shall be made, without any money being brought into court. And the court or judge making such reference shall restrain such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference. And in case no such application as aforesaid shall be made within such month as aforesaid, then it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor, or the executor, administrator or assignee of the attorney or solicitor whose bill may have been, as aforesaid, delivered, sent, or left, or upon the application of the party chargeable by such bill, with such directions, and subject to such conditions, as the court or judge making such reference shall think proper: provided that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill, after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, *or after the expiration of twelve months after such bill shall have been delivered, sent, or left as aforesaid, except under special circumstances to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made.* And upon every such reference, if either the attorney or solicitor, or executor, administrator, or assignee of the attorney or solicitor, whose bill shall have been delivered, sent, or left, or the party chargeable with such bill, having due notice, shall refuse or neglect to attend such taxation, the officer to whom such reference shall be made may proceed to tax and settle such bill and demand *ex parte*; and in case any such reference as aforesaid shall be made upon the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the costs of such reference shall, except as hereinafter provided for, be paid according to the event of such taxation; that is to say, if such bill, when taxed, be less by a sixth part than the bill delivered, sent, or left, then such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, shall pay such costs. And if such bill, when taxed, shall not be less by a one-sixth part than the bill delivered, sent, or left, then the party chargeable with such bill, making such ap-

plication or so attending, shall pay such costs, and every order to be made for such reference as aforesaid, shall direct the officer to whom such reference shall be made to tax such costs of such reference to be so paid as aforesaid, and to certify what, upon such reference, shall be found to be due to or from such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill and demand, and of the costs of such reference, if payable. Provided that such officers shall, in all cases, be at liberty to certify specially any circumstances relating to such bill or taxation, and the court or judge shall be at liberty to make thereupon such order as such court or judge may think right, respecting the costs of such reference. Provided also, that it shall be lawful for the said superior courts and judges, in the same cases in which they are respectively authorized, to refer a bill which has been so delivered, sent, or left, to make such order for the delivery by any attorney or solicitor, or the executor, administrator, or assignee of any attorney or solicitor, of such bill as aforesaid, and for the delivery up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has been heretofore done as regards such attorney or solicitor by such courts or judges respectively, when any such business has been transacted in the court in which such order was made. Provided that it shall not be necessary, in the first instance, for such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, in proving a compliance with the act, to prove the contents of the bill he may have delivered, sent, or left, but it shall be sufficient to prove that a bill of fees, charges, or disbursements, subscribed in the manner aforesaid, or inclosed in, or accompanied by such letter as aforesaid, was delivered, sent, or left in manner aforesaid; but, nevertheless, it shall be competent for the other party to show that the bill so delivered, sent, or left was not such a bill as constituted a *bonâ fide* compliance with the act. Provided also, that it shall be lawful for any judge of the superior courts of law or equity to authorize an attorney or solicitor to commence an action or suit for the recovery of his fees, charges, or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of such bill as aforesaid, on proof, to the satisfaction of the said judge, that there is probable cause for believing that such party is about to quit England."

The 38th section empowers a person not the party charge-

able within the meaning of the 37th clause, who shall be liable to pay or shall have paid any such bill, to apply for a reference of taxation, as if he were the party chargeable. And if, in such case, the case is one in which, under the 37th section, application could not be made except under special circumstances, the court may take into consideration any special circumstances applicable to the person actually making the application, though they might not be applicable to the person strictly under the 37th section chargeable with the bill. The 39th section authorizes the Lord Chancellor or Master of the Rolls, in cases in which trustees, executors, or administrators have become chargeable, to refer the bill, on the application of *a party interested in the property, out of which the trustee, executor, or administrator may have paid, or be entitled to pay the bill.*

By the 48th section, the court may order, for the purpose of any such reference, the solicitor or attorney, &c., to deliver to the party making the application a copy of the bill, on his paying the costs of the copy.

By the 41st section, it is provided that the payment of any such bill as aforesaid shall in no case preclude the court or judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such court or judge, appear to require the same, upon such terms and conditions, and subject to such directions as to such court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment.

Applications, made under the act, are to be made in the matter of such attorney or solicitor: (sect. 43.)

In general, it will have been seen by the act, that no application to tax can be made more than twelve months after the delivery of the bill, or if it has been paid, twelve months after payment, unless there are special circumstances. What are special circumstances has been the subject of much discussion.

A residuary legatee applied, more than twelve months after payment, to tax the bill brought against the executor. It was refused, notwithstanding there had been some agreement between the legatee and the solicitor, and that payment had been afterwards made behind the back of the legatee: (*Re Rees*, 12 Beav. 256.)

Overcharge alone is not sufficient, but overcharge and surprise or pressure combined, may amount to such circumstances as will entitle the client to tax a bill *paid*; the application being within twelve months of the payment. Thus,

where a meeting was appointed to settle important matters on the twenty-third of August, and the costs were then to be paid by A. B., and the bill of costs was only delivered the night before, and payment was then insisted on, though the bill was objected to : on evidence of overcharge, taxation was ordered after the payment : (*Re Elmslie*, 12 Beav. 538.) But where taxation was sought on the ground of overcharge in abstracts containing less than ten folios per page, but there was no pressure or surprise, the taxation was refused : (*Re Walsh*, 12 Beav. 490.)

In *Re Welchman* (11 Beav. 319), the question what was undue pressure came under consideration. In March, 1847, a railway company agreed to purchase some property and pay the vendor's costs ; in May, 1847, possession was delivered. The bill of costs of the vendor's solicitor was delivered on the 13th June, 1848, and a meeting to complete the purchase took place between the solicitors on the 20th June, when objections were made to the bill, and the solicitor offered to refer it to any respectable solicitor. The bill was then paid under protest, and with an intimation that a petition for taxation would be presented. It was held there was no sufficient pressure to justify taxation. So, in *Re Drew* (10 Beav. 368), a bill of costs was delivered on the 21st, and the party objected strongly to it ; on the 26th the solicitor demanded payment ; on the 30th the client paid it, and then he presented a petition for taxation. Held, that there was no sufficient pressure, and the taxation was refused. That overcharge alone will not do (see *Re Stirke*, 11 Beav. 304) ; there must be overcharge and pressure.

Where there is a doubtful special agreement for costs, the court has no jurisdiction on petition for taxation to construe it : (*Re Beale*, 11 Beav. 600.) But the court will take the effect of a special agreement, in itself clear, into consideration on the question of taxation, under a common order for taxation : (*Re Eyre*, 10 Beav. 569.)

And under the common order, the Master may take an account of sums received by the solicitor for his client in the character of solicitor, and which are connected with the items in the bill ; but he cannot take a general account between the parties : (*Cooper v. Ewart*, 15 Sim. 564.)

A special petition for taxation of a paid bill, must set forth the special circumstances ; but it need not mention the specific items objected to. Thus, in *Ex parte Andrews* (13 L. T. 222), the petition stated that the solicitors had refused to allow certain deeds to be examined till their bill of costs had been paid ; but it did not refer to the items

objected to. The Lord Chancellor said, the allegation amounted to a special circumstance within the meaning of the act, and if the petitioner had relied on that only, he should have made the order. Unfortunately, in that case, the petitioner went further, and in his affidavit fixed on particular items, which he thought the most objectionable, but which the court thought sufficiently explained, and the order was therefore refused.

But in *Re Bennett* (8 Beav. 467), where a *cestui que trust* sought to tax the bill paid by his trustee, the court said, that when you seek to have taxation of a bill paid, on the ground of overcharges, the specific items must be alleged in the petition and proved in the evidence. In that case, however, the petitioner did not even allege *any special circumstances*, but merely that the bill contained many improper and extravagant charges.

The act expressly provides that a bill may be taxed, though the whole of it is for business out of court, but it must be business connected with the attorney's profession of an attorney. In other words, it must be business arising out of the relation of attorney and client: (*Allen v. Aldridge*, 5 Beav. 401.)

A petition for taxation of a bill of costs, within the month, is what is termed a petition of course, and the order is as of course; that is, no opposition can be made to it. The petition is therefore *ex parte*, like any other petition of course, and the order is made as of course. The petition then only states the employment of the solicitor, as such; that the solicitor delivered the bill, and that the petitioner submits to pay it upon taxation. But *after payment*, or after *the month*, the application is special, and must be served on the respondent, and is heard in court; an *ex parte* application in such a case is irregular: (*Re Becke*, 5 Beav. 406.)

But an order of course for taxation will be discharged with costs, if the solicitor denies the employment: (*Re Eldridge*, 12 Beav. 387.)

If a solicitor is employed by three jointly, two may present a petition for taxation, though the third will not concur; but the third must be served: (*Re Hair*, 10 Beav. 187.)

It has been stated, that to obtain taxation after payment, there must be pressure and overcharge. But if there is pressure, slight overcharge will be sufficient, and it is not necessary the overcharge should amount to fraud: (*Re Wells*, 8 Beav. 416.) In that case, the whole bill was only nineteen pounds one shilling and tenpence, the overcharges amounted to two pounds four shillings, and the solicitor

obtained his costs of the petition and of the taxation. To this case the reporter appends an instructive note, that "the respondent's costs alone of these proceedings, which ended in striking off two pounds four shillings from a bill of nineteen pounds one shilling and tenpence, were taxed at forty-five pounds nine shillings."

It has been very much the practice to present petitions for taxation at the Rolls, and not elsewhere, but it is quite settled that such petitions may be dealt with by any Vice-Chancellor, as well as by the Master of the Rolls.

With regard to the necessity of signature by the solicitor to his bill of costs, that is intended by the act for the protection of the client, not of the solicitor; and therefore, though the solicitor cannot sue for his bill, unless he has so authenticated it, the absence of the authentication does not prevent the client presenting a petition for taxation: (*Re Pender*, 2 Phil. 69.)

The payment of the bill is, *primâ facie*, an admission of its correctness. Hence it is that the client, desiring afterwards to tax it, must show special circumstances. Those special circumstances are usually, as we have shown, pressure and overcharge. The case of *Re Wells* shows that, if there is pressure proved, very slight overcharges are sufficient. And *Re Harding* (10 Beav. 250), seems to show, on the other hand, that if there is evidence of overcharge amounting to fraud, that is, overcharges so gross that they must be considered fraudulent, very little evidence of pressure will do. *Re Drake* (8 Beav. 123) shows clearly that one of the circumstances alone will not do. In that case, the petition alleged that the bill had been paid under protest, and specified overcharges amounting to over half the bill. The payment was not proved to have been made under protest, and the court dismissed the petition, expressing, at the same time, its dissatisfaction with the correctness of the items, and on that ground giving no costs.

APPENDIX.

15 & 16 VICT. CAP. 86.

An Act to amend the Practice and Course of Proceeding in the High Court of Chancery.

Be it enacted—

Sect. I. *Practice of engrossing bills on parchment discontinued, and a printed bill to be filed instead.*—From and after the time hereinafter appointed for the commencement of this act, the practice of engrossing on parchment bills of complaint or claims to be filed in the said court, and of filing such engrossment, shall be discontinued; and the Clerks of Records and Writs of the said court shall receive and file a printed bill of complaint or claim, in lieu of an engrossment thereof, in like manner as they now receive and file such engrossment.

A printed bill in which a party had been described by the christian name of *Maria Constantia*, instead of *Constantia Maria*, and which had been altered by the plaintiff's solicitor, by transposing the words, striking out *Maria*, before, and writing it in ink after *Constantia*, was ordered to be filed though not wholly printed. The court observing that such an order would not be made extending to sanction any extensive or important alteration in the printed document, or any alteration which would affect its legibility: (*Yeatman v. Moulsey*, 16 Jur. 1004.)

II. *Writs of subpœna and summons to be abolished.*—The writ of subpœna to appear to and answer a bill of complaint, in the said court, and the writ of summons upon a claim shall respectively be abolished.

III. *Defendants to be served with a printed bill in lieu of the writs of subpœna and summons.*—In lieu of serving the defendant to a bill of complaint in the said court with a writ of subpœna to appear to and answer the same, and in lieu of serving the defendant to a claim in the said court with a writ of summons upon such claim, in the mode and according to the practice now adopted in the said court with reference to such writs respectively, the defendant shall be served with a printed bill of complaint or claim, with an indorsement thereon, in the form or to the effect set out in the schedule to this act, with such variations as circumstances may require, such printed bill of complaint or claim so to be served being previously

stamped with a proper stamp by one of the Clerks of Records and Writs, indicating the filing of such bill of complaint or claim, and the date of the filing thereof.

The indorsement on a bill or claim, if printed, may be altered before it is served, when the time for appearance has been enlarged or varied by the order of the court. *Quære*, whether it is necessary that the indorsement on a bill or claim should be printed: (*Baynes v. Ridge*, 9 Hare, App. 27; and see *Chatfield v. Berchtoldt*, 9 Hare, App. 28.)

IV. *The filing and service of a printed bill or claim to have the same effect as the filing and issuing of writs of subpœna and summons.*—The filing of a printed bill of complaint or claim in the said court shall have the same effect as the filing of a bill of complaint or claim in the same court, and the issuing of a subpœna or writ of summons thereon respectively now have, and the service upon the defendant of a printed bill of complaint or of a claim so filed with such indorsement thereon, so stamped as aforesaid, shall have the same effect as the service on him of a writ of subpœna or writ of summons respectively now has, and shall entitle the plaintiff in such suit to such remedies for default of appearance and otherwise as he is now entitled to in case of due and proper service of a subpœna to appear to and answer a bill of complaint, or of a writ of summons upon a claim.

V. *As to service of printed bill.*—The service upon any defendant of a printed copy of a bill of complaint or of a claim in the said court shall be effected in the same manner as service of a writ of subpœna to appear to and answer a bill of complaint is now effected, save only that it shall not be necessary to produce the original bill or claim, which will be on the files of the court; provided that the court shall be at liberty to direct substituted service of such printed bill or claim, in such manner and in such cases as it shall think fit.

VI. *Written copies of bills may be served in certain cases, upon plaintiff undertaking to file a printed copy in fourteen days.*—Notwithstanding the provisions hereinbefore contained, the Clerks of Records and Writs of the said court may receive and file a written copy of any bill of complaint praying a writ of injunction or a writ of *ne exeat regno*, filed for the purpose either solely or among other things of making an infant a ward of the said court, upon the personal undertaking of the plaintiff or his solicitor, to file a printed copy of such bill within fourteen days, and every bill of complaint so filed shall be deemed and taken to have been filed at the time of filing the written copy thereof; and a written copy of any such bill of complaint, stamped as aforesaid, may be served on any defendant thereto, and such service shall have the same effect as the service of a printed copy.

A plaintiff who has filed a written copy of his bill under the statute, may file interrogatories under section 12, notwithstanding the time allowed for filing the printed copy has not expired, and he has not filed such printed copy: (*Lambert v. Lomas*, 9 Hare, App. 29.)

VII. *Plaintiff to deliver printed copies or bill of claim at rate prescribed by Lord Chancellor.*—The plaintiff in any suit to be commenced in the said court after the time hereinafter appointed for the commencement of this act, shall be bound to deliver to the defendant or his solicitor, upon application for the same, such a number of printed copies of his bill of complaint or claim as he shall have occasion for, upon being paid for the same at such rate as shall be prescribed by any General Order of the Lord Chancellor in that behalf.

VIII. *Provisions as to filing, &c., prints of original bill extended to amendments.*—In certain cases a printed bill may be wholly or partially amended.—Upon the amendment of any bill of complaint or claim, to be filed in the said court, after the time hereinafter appointed for the commencement of this act, the provisions hereinbefore contained with respect to filing and serving, and delivering printed copies thereof shall, so far as may be, extend and be applicable to the bill or claim as amended: provided that where, according to the present practice of the said court, an amendment of a bill or claim may be made without a new engrossment thereof, or under such other circumstances as shall be prescribed by any General Order of the Lord Chancellor in that behalf, a bill or claim may be wholly or partially amended by written alterations in the printed bill of complaint or claim so to be filed as aforesaid.

Where more than two folios in one place are introduced by amendment in a bill, it must be reprinted: (*Stone v. Davies*, 3 De Gex, Macn. & Gord. 240.)

IX. *Power to Lord Chancellor to revive the present practice as to filing of bills, &c.*—It shall be lawful for the Lord Chancellor from time to time to make any order or orders directing that the provisions hereinbefore contained as to printing or otherwise shall be discontinued or suspended until further order, and to direct that all or any of the present practice as to the filing of bills and claims, and the issuing and service of subpoenas and writs of summons, may be revived and come into operation as if this act had not passed.

X. *Bills of complaint to contain concise narrative of material facts, &c., divided into numbered paragraphs, but not to contain interrogatories.*—Every bill of complaint to be filed in the said court after the time hereinafter appointed for the commencement of this act shall contain as concisely as may be a narrative of the material facts, matters, and circumstances on which the plaintiff relies, such narrative being divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate and distinct statement or allegation, and shall pray specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief: but such bill of complaint shall not contain any interrogatories for the examination of the defendant.

It is not necessary now, in every case, to insert a charge of documents in a bill, as a foundation for the usual interrogatories concerning them.

Exceptions to an answer to an interrogatory concerning

documents, are now unnecessary, because the discovery may be enforced in chambers : (*Perry v. Turpin*, Kay, App. 49.)

XI. *Person whose name is used as next friend of any infant, &c., in any suit, &c., to sign a written authority.*—Before the name of any person shall be used in any suit to be instituted in the said court, as next friend of any infant, married woman, or other party, or as relator in any information, such person shall sign a written authority to the solicitors for that purpose, and such authority shall be filed with the bill, information, or claim.

XII. *Interrogatories to be filed in Record Office by plaintiff within time prescribed.*—Within a time to be limited by a General Order of the Lord Chancellor in that behalf, the plaintiff in any suit in the said court commenced by bill, may, if he requires an answer from any defendant thereto, file in the Record Office of the said court interrogatories for the examination of the defendant or defendants, or such of them from whom he shall require an answer, and deliver to the defendant or defendants so required to answer, or to his or their solicitor, a copy of such interrogatories, or of such of them as shall be applicable to the particular defendant or defendants: and no defendant shall be called upon or required to put in any answer to a bill unless interrogatories shall have been so filed, and a copy thereof delivered to him or his solicitor, within the time so to be limited, or within such further time as the court shall think fit to direct.

Delivery of a copy of the interrogatories to a bill by leaving it at the office of the defendant's solicitors, without being served on the solicitor personally, held sufficient under this section : (*Bowen v. Price*, 2 De Gex, Macn. & Gord. 899 ; see also the case in the note to section 6.)

XIII. *Defendants may answer without leave within the time now allowed, though not required so to do by plaintiff; but after that time defendant must have leave.*—Whether the plaintiff in any suit in the said court commenced by bill does or does not require any answer from the defendant or any one or more of the defendants to the bill, such defendant or defendants may, without any leave of the court, put in a plea, answer, or demurrer to the plaintiff's bill, within the time now allowed to the defendant for demurring alone to a bill, or within such other time as shall be fixed by any General Order of the Lord Chancellor in that behalf ; but after that time a defendant or defendants not required to answer the plaintiff's bill, shall not be at liberty to put in a plea, answer, or demurrer to the bill, without leave of the court : provided that the power of the court to grant further time for pleading, answering, or demurring, to any bill upon the application of any defendant or defendants thereto, whether required to answer the bill or not, shall remain in full force, and shall not be in any wise prejudiced or affected : provided also that if the court shall grant any further time to any defendant for pleading, answering, or demurring to the bill, the plaintiff's right to move for a decree under the provisions hereinafter contained, shall, in the meantime be suspended.

XIV. *Defendant's answer may contain not only answer to interrogatories, but statements material to his case.*—The answer of the defendant to any bill of complaint in the said court, may contain not only the answer of the defendant to the interrogatories so filed as aforesaid, but such statements material to the case as the defendant may think it necessary or advisable to set forth therein, and such answer shall also be divided into paragraphs, numbered consecutively, each paragraph containing as nearly as may be a separate and distinct statement or allegation.

XV. *Plaintiff may, on expiry of time for answering, but before replication, move for a decree or decretal order—Affidavits may be filed.*—The plaintiff in any suit commenced by bill shall be at liberty, at any time after the time allowed to the defendant for answering the same shall have expired (but before replication), to move the court, upon such notice as shall in that behalf be prescribed by any General Order of the Lord Chancellor, for such decree or decretal order as he may think himself entitled to; and the plaintiff and defendant respectively shall be at liberty to file affidavits in support of and in opposition to the motion so to be made, and to use the same on the hearing of such motion; and if such motion shall be made after an answer filed in the cause, the answer shall, for the purposes of the motion, be treated as an affidavit.

After filing a traversing note against one defendant, the plaintiff can proceed by motion for decree as though the traversing note were an answer: (*Maniere v. Leicester*, Kay, App. 48.)

A plaintiff in a suit commenced by bill, before as well as after the 15 & 16 Vict. c. 86, may move for a decree under the 15th section: (*Cousins v. Vasey*, 9 Hare, App. 31.)

Notice of motion for a decree, under the 15th section of the act, may be served on a defendant out of the jurisdiction. The order for leave to serve the notice out of the jurisdiction is to be drawn up and served, and is to specify the time allowed for filing affidavits in reply: (*Meek v. Ward*, 10 Hare, App. 55.)

XVI. *Court may refuse or grant such motion, or make order for further prosecution, &c.*—Upon any such motion for a decree or decretal order it shall be discretionary with the court to grant or refuse the motion, or to make an order giving such directions for or with respect to the further prosecution of the suit as the circumstances of the case may require, and to make such order as to costs as it may think right.

XVII. *Practice of excepting to bills, answers, &c., for impertinence abolished—Proviso as to costs.*—The practice of excepting to bills, answers, and other proceedings in the said court, for impertinence, shall be and the same is hereby abolished: provided always, that it shall be lawful for the court to direct the costs occasioned by any impertinent matter introduced into any proceedings in the said court to be paid by the party introducing the same, upon application being made to the court for that purpose.

XVIII. *Court or judge may order defendant to produce documents, &c. on oath.*—It shall be lawful for the court, upon the application of the plaintiff in any suit in the said court, whether commenced by bill or by claim, and as to a suit commenced by bill, whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production by any defendant, upon oath, of such of the documents in his possession or power relating to matters in question in the suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.

The 18th section of the act does not enable a plaintiff to read an affidavit on a motion to produce documents, to substantiate the possession of documents not specifically admitted by the answer to be in the defendant's possession: (*Lamb v. Orton*, 1 Drew. 414; see also the note to section 6.)

Exceptions for insufficiency of answers to interrogatories as to books and papers under the new practice, generally discouraged. Whether a company or corporation, answering under their common seal, is a defendant against whom an order may be made under the 18th section of the act, *quære*: (*Law v. London*, §c., 10 Ilare, App. 20.)

XIX. *In certain cases defendant, after answer, may file interrogatories for examination of plaintiff*—*Defendant may exhibit a cross bill instead of filing interrogatories.*—It shall be lawful for any defendant in any suit, whether commenced by bill or by claim, but in suits commenced by bill which the defendant is required to answer, not until after he shall have put in a sufficient answer to the bill, and without filing any cross bill of discovery, to file in the Record Office of the said court, interrogatories for the examination of the plaintiff, to which shall be prefixed a concise statement of the subject on which discovery is sought, and to deliver a copy of such interrogatories to the plaintiff or his solicitor; and such plaintiff shall be bound to answer such interrogatories in like manner as if the same had been contained in a bill of discovery filed by the defendant against him, on the day which such interrogatories shall have been filed, and as if the defendant to such bill of discovery had on the same day duly appeared, and the practice of the court with reference to excepting to answers for insufficiency or for scandal, shall extend and be applicable to answers put in to such interrogatories, provided that in determining the materiality or relevancy of any such answer, or of any exception thereto, the court is to have regard in suits commenced by bill, to the statements contained in the original bill, and in the answer which may have been put in thereto, by the defendant exhibiting such interrogatories for the examination of the plaintiff, and in suits commenced by claim, to the statements therein, and in any affidavits which may have been filed either in support thereof, or in opposition thereto: provided also, that a defendant, if he shall think fit so to do, may exhibit a cross bill of discovery against the plaintiff, instead of filing interrogatories for his examination.

XX. *Upon application of defendant after answer, plaintiff may be required to produce documents on oath.*—It shall be lawful for the court, upon the application of any defendant in any suit, whether commenced by bill or by claim, but as to suits commenced by bill, where the defendant is required to answer the plaintiff's bill, not until after he has put in a full and sufficient answer to the bill, unless the court shall make any order to the contrary, to make an order for the production by the plaintiff in such suit on oath of such of the documents in his possession or power relating to the matters in question in the suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.

The 20th section of the statute does not extend to enable a defendant to obtain an order for the production of documents in the possession of co-defendants; in such a case, a cross bill may still be necessary: (*Attorney-General v. Clapham*, 10 Hare, App. 68.)

No affidavit is necessary to support an application for production of documents on oath under the 20th section of the act, whether the application be by the plaintiff or by the defendant: (*Rochdale Canal Company v. King*, 15 Beav. 11.)

XXI. *Practice of issuing commissions to take answers, &c., within the jurisdiction of the court abolished.*—The practice of the said court, of issuing commissions to take pleas, answers, disclaimers, and examinations in causes and matters pending in the said court, shall, with respect to pleas, answers, disclaimers, and examinations taken within the jurisdiction of the court, be, and the same is hereby abolished; and any such plea, answer, disclaimer, or examination may be filed without any further or other formality than is required in the swearing and filing of an affidavit.

The 21st section does not involve any alteration in the form of the oath to be administered to a defendant on putting in his answer: (*Attorney-General v. Hudson*, 9 Hare, App. 63.)

XXII. *Pleas declarations, &c., in Chancery, how to be sworn and taken in Scotland, Ireland, the Channel Islands, &c.*—All pleas, answers, disclaimers, and examinations, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court of Chancery, and also acknowledgments required for the purpose of enrolling any deed in the said court, shall and may be sworn and taken in Scotland or Ireland, or the Channel Islands, or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorized to administer oaths in such country, colony, island, plantation, or place respectively, or before any of Her Majesty's consuls or vice-consuls in any foreign parts out of Her Majesty's dominions; and the judges and other officers of the said Court of Chancery shall take judicial notice of the seal or signature, as the case

may be, of any such court, judge, notary public, person, consul, or vice-consul attached, appended, or subscribed to any such pleas, answers, disclaimers, examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or other documents to be used in the said court.

Affidavits may still be sworn before notaries public in foreign countries, notwithstanding this section : (*Haggett v. Iniff*, 1 Jur. (N. S.) 36 ; and see 1 Jur. 49, on appeal.)

This section does not enact that the judge of the Court of Chancery shall take judicial notice of the signature of a person who is a public officer in a colony, but is not a judge or notary public, and is not lawfully authorized to administer oaths in such colony : (*Baillie v. Jackson*, 17 Jur. 170.)

Affidavits taken in the colonies previously to the passing of the act in the presence of a person lawfully authorized to administer oaths, are receivable in this country under this section, without verification of the signature of the person before whom they have been taken : (*Buteman v. Cook*, 3 De Gex, Macn. & Gord. 39.)

XXIII. *Penalty for false swearing, &c.*—All persons swearing, declaring, affirming, or attesting before any person authorized by this act to administer oaths and take declarations, affirmations, or attestations of honour shall be liable to all such penalties, punishments, and consequences for any wilful and corrupt false swearing, declaring, affirming, or attesting contained therein as if the matter sworn, declared, affirmed, or attested had been sworn, declared, affirmed, or attested before any court or persons now by law authorized to administer oaths, and take declarations, affirmations, or attestations upon honour.

XXIV. *Penalty for forging signature or seal of judge, &c., empowered to administer oaths under this act.*—If any person shall forge the signature or the official seal of any such judge, notary public, or other person lawfully authorized to administer oaths under this act, or shall tender in evidence any plea, answer, disclaimer, examination, affidavit, or other judicial or official document, with a false or counterfeit signature or seal of any such judge, court, notary public, or other person authorized as aforesaid attached or appended thereto, knowing the same signature or seal to be false or counterfeit, every such person shall be guilty of felony, and shall be liable to the same punishment as any offender under an act passed in the eighth and ninth years of the reign of Her present Majesty, intitled *An Act to facilitate the Admission in Evidence of certain Official and other Documents*.

XXV. *Answers, &c., to be filed without oath of messenger.*—Pleas, answers, disclaimers, or examinations, whether taken by commission out of the jurisdiction of the said court or otherwise, may be filed without the oath of a messenger, and any alterations made therein previously to the taking thereof shall be authenticated according to the practice now in use with respect to affidavits.

XXVI. *Issue may be joined by filing replication as at present.*—In suits in the said court commenced by bill, where notice of motion for a decree or decretal order shall not have been given, or, having been given, where a decree or decretal order shall not have been made thereon, issue shall be joined by filing a replication in the form or to the effect of the replication now in use in the said court: and where a defendant shall not have been required to answer and shall not have answered the plaintiff's bill, he shall be considered to have traversed the case made by the bill.

Notice of filing replication under this section and the 28th General Order of August allowed to be inserted in the Gazette, and in two newspapers of the county in which the defendant was known to have last resided; see a case in which the plaintiff had entered an appearance for the defendant, and no place had been fixed for service of the notices; (*Barton v. Whitcombe*, 9 Hare, App. 87.)

When a defendant has not appeared and cannot be found, and no answer is required, the plaintiff, after filing replication, should insert advertisements in the *London Gazette*, and in two newspapers, of the fact of replication having been filed, and will then have the usual time from the date of the advertisements for going into evidence; after which, he may obtain an order for substituted service to hear judgment: (*Jenkyn v. Vaughan*, 3 Drew. 20.)

XXVII. *Defendant not having been required to answer, and not answering, may move for dismissal of bill for want of prosecution.*—Where a defendant to a suit in the said court commenced by bill shall not have been required to answer the bill and shall not have answered the same, such defendant shall be at liberty to move to dismiss the bill for want of prosecution, at such times, and under such circumstances, and subject to such restrictions as shall be in that behalf prescribed by any General Order of the Lord Chancellor.

XXVIII. *Practice of court as to, and mode of examining witnesses, abolished—Court may order particular witnesses to be examined upon interrogatories as now practised.*—The mode of examining witnesses in causes in the said court, and all the practice of the said court in relation thereto, so far as such practice shall be inconsistent with the mode hereinafter prescribed of examining such witnesses, and the practice in relation thereto, shall, from and after the time appointed for the commencement of this act, be abolished: provided always, that the court may, if it shall think fit, order any particular witness or witnesses within the jurisdiction of the said court, or any witness or witnesses out of the jurisdiction of the said court, to be examined upon interrogatories in the mode now practised in the said court, and that with respect to such witness or witnesses the practice of the said court in relation to the examination of witnesses shall continue in full force, save only so far as the same may be varied by any General Order of the Lord Chancellor in that behalf, or by any order of the court with reference to any particular case.

XXIX. *Plaintiff, where suits by bill at issue, may give notice to defendant to adduce evidence orally or by affidavit.*—When any suit commenced by bill shall be at issue, the plaintiff shall, within such time thereafter as shall be prescribed in that behalf by any General Order of the Lord Chancellor, give notice to the defendant that he desires that the evidence to be adduced in the cause shall be taken orally or upon affidavit, as the case may be; and if the plaintiff shall desire the evidence to be adduced upon affidavit, and the defendant, or some or one of the defendants, if more than one, shall not, within such time as shall be prescribed in that behalf by any General Order of the Lord Chancellor, give notice to the plaintiff or his solicitor that he or they desire the evidence to be oral, the plaintiffs and defendants respectively shall be at liberty to verify their respective cases by affidavit.

In a suit by a mortgagee to redeem prior mortgages, and for a sale, the mortgagor by his answer disputed the validity of the plaintiff's mortgage on the ground that the execution of it by the mortgagee had been obtained by a fraud concocted between one of the attesting witnesses to the deed and other persons, and without the plaintiff knowing the contents of it; the defendant had elected to have the evidence in the case taken orally. The plaintiff, not being able to obtain an appointment before the examiner for some time, moved that he might be at liberty at the hearing to prove his mortgage deed by affidavit. Held, that as the answer impeached the deed in this manner, it could not be proved as an exhibit at the hearing, and as the witnesses would probably be cross-examined, no time would be saved by the proposed course; and therefore motion refused, and as, if granted, it would have been an indulgence, it was refused with costs. The advantage of having witnesses produced for examination, and seeing their demeanour, is a right of which the court will not deprive the parties: (*Hitchcock v. Carew*, Kay, App. 14.)

XXX. *Evidence may be taken orally if required, but the court may in certain cases make an order, &c.*—When any of the parties to any suit commenced by bill desires that the evidence should be adduced orally, and gives notice thereof to the opposite party as hereinbefore provided, the same shall be taken orally, in the manner hereinafter provided; provided, that if the evidence be required to be oral merely by a party without a sufficient interest in the matters in question, the court may, upon application in a summary way, make such order as shall be just.

XXXI. *Witnesses to be examined by one of the examiners of the court in the presence of the parties.*—All witnesses to be examined orally under the provisions of this act shall be so examined by or before one of the examiners of the court, or by or before an examiner to be specially appointed by the court, the examiner being furnished by the plaintiff with

a copy of the bill, and of the answer, if any, in the cause; and such examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses so examined orally shall be subject to cross-examination and re-examination; and such examination, cross-examination, and re-examination shall be conducted as nearly as may be in the mode now in use in courts of common law with respect to a witness about to go abroad, and not expected to be present at the trial of a cause.

XXXII. *Depositions to be taken down in writing and read over to the witness, who shall sign the same in presence of the parties, but if he refuse to sign, examiner may, and state any special matter he may think fit.*—The depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative, and when completed shall be read over to the witness, and signed by him in the presence of the parties, or such of them as may think fit to attend: provided always, that in case the witness shall refuse to sign the said depositions, then the examiner shall sign the same, and such examiner may, upon all examinations, state any special matter to the court as he shall think fit: provided also, that it shall be in the discretion of the examiner to put down any particular question or answer, if there should appear any special reason for doing so; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide upon the materiality or relevancy of any question or questions; and the court shall have power to deal with the costs of immaterial or irrelevant depositions as may be just.

The examination of witnesses *de bene esse* is to be taken orally, according to the mode prescribed by sections 30, 31, and 32 of the statute: (*Cook v. Hall*, 9 Ilare, App. 20.)

Plaintiff moved that a solicitor cannot be appointed to examine witnesses residing more than twenty-eight miles from London. Held, the application might be by motion in court instead of at chambers, and that the old practice in case of witnesses residing so far from London was unchanged, but the evidence in the case being special, a barrister chosen by both parties must be the examiner: costs to be costs in the cause: (*Reed v. Prest*, Kay, App. 14.)

Examiners are bound under the act to take down the depositions in their own handwriting: (*Hobart v. Todd*, 18 Jur. 618.)

XXXIII. *If parties refuse to be sworn or to answer any lawful questions, the same course to be pursued as is now adopted—Provido as to witness demurring to questions.*—If any person produced before any such examiner as a witness shall refuse to be sworn, or to answer any lawful

question put to him by the examiner, or by either of the parties, or by his or their counsel, solicitor, or agent, the same course shall be adopted with respect to such witness as is now pursued in the case of a witness produced for examination before an examiner of the said court, upon written interrogatories, and refusing to be sworn, or to answer some lawful question: provided always, that if any witness shall demur or object to any question or questions which may be put to him, the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the Record Office of the said court, to be there filed; and the validity of such demurrer or objection shall be decided by the court; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the court.

XXXIV. *Original depositions to be transmitted to the Record Office, and filed.*—When the examination of witnesses before any examiner shall have been concluded, the original depositions, authenticated by the signature of such examiner, shall be transmitted by him to the Record Office of the said court, to be there filed, and any party to the suit may have a copy thereof or of any part or portion thereof upon payment for the same in such manner as shall be provided by any General Order of the Lord Chancellor in that behalf.

XXXV. *Commission for examination of witnesses dispensed with, and examiner empowered to administer oaths.*—It shall not be necessary to sue out any commission for the examination of any witnesses within the jurisdiction of the said court; and any examiner appointed by any order of the court shall have the like power of administering oaths as commissioners now have under commissions issued by the court for the examination of witnesses.

XXXVI. *Affidavits as to particular facts, &c., may be used.*—Notwithstanding that the plaintiff or the defendant in any suit in the said court may have elected that the evidence in the cause should be taken orally, affidavits by particular witnesses, or affidavits as to particular facts or circumstances, may, by consent, or by leave of the court obtained upon notice, be used on the hearing of any cause, and such consent, with the approbation of the court, may be given by or on the part of married women or infants or other persons under disability.

The 36th section requires special reasons to be shown to the court affecting either party, witnesses, or particular facts: (*Rogers v. Hooper*, 2 Drew. 97.)

When the evidence in a cause is taken orally, a general application under the 36th section of the act, to be at liberty to use at the hearing, affidavits already filed, is irregular. The particular facts and circumstances proposed to be proved by affidavit should be specified both in the notice of motion and in the order: (*Ivison v. Grassoit*, 17 Beav. 321.)

Case in which a plaintiff was held not to be entitled to take the evidence of a witness in his behalf by affidavit under the 36th section of the act: (9 Hare, App. 18.)

Appointment of an examiner to take orally the evidence of a witness residing out of the jurisdiction: (*Crofts v. Middleton*, 9 Hare, App. 18.)

XXXVII. *Affidavits to be divided into paragraphs numbered.*—Every affidavit to be used in the said court shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and, as nearly as may be, shall be confined to a distinct portion of the subject.

XXXVIII. *Evidence, oral or by affidavit, on both sides, to be closed within time prescribed by General Order—Witnesses by affidavit to be subject to oral cross-examination, and afterwards to re-examination—Witnesses bound to attend—As to expenses attending cross-examinations, &c.*—The evidence on both sides in any suit in the said court, whether taken orally or upon affidavit, shall be closed within such time or respective times after issue joined as shall in that behalf be prescribed by any General Order of the Lord Chancellor, but with power to the court to enlarge the same as it may see fit; and after the time fixed for closing the evidence no further evidence, whether oral or by affidavit, shall be receivable, without special leave of the court previously obtained for that purpose: provided always, that any witness who has made an affidavit filed by any party to a cause shall be subject to oral cross-examination within such time after the time fixed for closing the evidence as shall be prescribed in that behalf by any order of the Lord Chancellor, by or before an examiner, in the same manner as if the evidence given by him in his affidavit had been given by him orally before the examiner, and after such cross-examination may be re-examined orally by or on the part of the party by whom such affidavit was filed; and such witness shall be bound to attend before such examiner to be so cross-examined and re-examined, upon receiving due and proper notice, and payment of his reasonable expenses, in like manner as if he had been duly served with a writ of *subpoena ad testificandum* before such examiner; and the expenses attending such cross-examination and re-examination shall be paid by the parties respectively, in like manner as if the witness so to be cross-examined were the witness of the party cross-examining, and shall be deemed costs in the cause of such parties respectively, unless the court shall think fit otherwise to direct.

An examiner, before whom witnesses who have made affidavits are being cross-examined for the purpose of obtaining evidence on an interlocutory motion, is at liberty to return part of these depositions at a time. But if the evidence is being taken for the hearing of the cause, it seems he cannot return any till the examination is closed. Professional witnesses have a right to demand compensation for loss of time at the rate of a guinea a day, before they submit to be examined, though residing in the town where the examination is conducted: (*Clarke v. Gill*, 1 Kay & J. 19.)

After the time for closing the evidence in a cause has expired, the court will not, under this clause, extend it except under special circumstances. Both parties may abstain from filing their affidavits till immediately before the expiration of the time fixed for closing the evidence: (*Thompson v. Partridge*, 4 De Gex, Macn. & Gord. 794.)

XXXIX. *Court may require the production and oral examination before itself of any witness, &c., and determine payment of the costs.*—Upon the hearing of any cause depending in the said court, whether commenced by bill or by claim, the court, if it shall see fit so to do, may require the production and oral examination before itself of any witness or party in the cause, and may direct the costs of and attending the production and examination of such witness or party, to be paid by such of the parties to the suit or in such manner as it may think fit.

A failure in establishing the case of the plaintiff in a claim, is not, since the statute, a ground for giving him liberty to file a bill, for on a proper case, the court, under the 39th section of the statute, will direct a further and oral examination of the parties as witnesses, rather than leave the parties to further proceedings: (*Wilkinson v. Stringer*, 9 Hare, App. 23.)

Attendance of the plaintiff and another witness for oral examination ordered under the 39th section of the act, at the hearing of a claim founded on a legal demand, where, before the statute, the court would have given liberty to bring an action: (*Deaville v. Deaville*, 9 Hare, App. 22.)

The Court of Appeal has jurisdiction to require the production and examination before itself of a party to a cause, although he may not have been examined in the court below. The expression “upon the hearing” means wherever and whenever a cause is heard: (*Hope v. Threlfall*, 23 L. T. 631.)

XL. *Any party in a cause may by subpœna require attendance of any witness before an examiner.*—Any party in any cause or matter depending in the said court may, by a writ of *subpœna ad testificandum* or *duces tecum*, require the attendance of any witness before an examiner of the said court, or before an examiner specially appointed for the purpose, and examine such witness orally, for the purpose of using his evidence upon any claim, motion, petition, or other proceeding before the court, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause; and any party having made an affidavit to be used or which shall be used on any claim, motion, petition, or other proceeding before the court shall be

bound on being served with such writ to attend before an examiner, for the purpose of being cross-examined; provided always, that the court shall always have a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders, or otherwise, as may appear necessary to meet the justice of the case.

Upon a motion for a decree, after the affidavits on both sides had been filed, and the plaintiff had made an affidavit in reply, the defendant was permitted to cross-examine the plaintiff under the 40th section. An order for the special appointment of an examiner may be obtained by summons at chambers: (17 Jur. 434.)

A motion for a decree is a proceeding within the meaning of the 40th section, and therefore, for the purpose of such a motion, a defendant may cross-examine the plaintiff: (*Williams v. Williams*, 17 Beav. 156.)

Where further evidence is necessary after a decree, a special order of the court is not necessary for the oral examination of witnesses before the examiner: (*Anon.* 23 L. T. 24.)

A motion for an injunction was ordered to stand over, with liberty to bring an action. Held, that a witness who had made an affidavit on the occasion, might afterwards, and before the trial, be cross-examined under this section: (*Lloyd v. Whitty*, 19 Beav. 57.)

Application under this act and the 15 & 16 Vict. c. 80, to examine a defendant *vivâ voce* in the Master's office refused, the decree having directed the examination on interrogatories: (*Routh v. Tomlinson*, 16 Beav. 251.)

On a motion to dissolve an injunction to stay proceedings at law, the plaintiff in equity has no right, under the 40th section, to require that the motion shall stand over, in order that he might examine orally, witnesses who have made affidavits for the defendant: (*Normanville v. Stanning*, 10 Hare, App. 20.)

Upon a motion for an injunction, defendant asking for time to answer affidavits was put on terms to file his affidavits in two days, an interim injunction being granted until the next seal. He then applied for an order appointing a special examination, and directing the plaintiff who had made an affidavit in support of the motion to attend on the next day without further notice before the special examination to be cross-examined on his affidavit. Motion granted, and held that the plaintiff should have the like liberty of cross-examining defendant on an affidavit by him denying a simple fact alleged by the plaintiff, and made for the purpose of

gaining time, and that the defendant would not be prevented by such cross-examination, and his own re-examination from afterwards filing further affidavits : (*Besemeres v. Besemeres Kay*, App. 17.)

XLI. *Evidence subsequent to hearing to be taken the same as prior to hearing.*—In cases where it shall be necessary for any party to any cause depending in the said court to go into evidence subsequently to the hearing of such cause, such evidence shall be taken as nearly as may be in the manner hereinafter provided with reference to the taking of evidence with a view to such hearing.

XLII. *Defendant not to take objection for want of parties in any case to which rules herein set forth shall extend.*—It shall not be competent to any defendant in any suit in the said court to take any objection for want of parties to such suit, in any case to which the rules next hereinafter set forth extend; and such rules shall be deemed and taken as part of the law and practice of the said court, and any law or practice of the said court inconsistent therewith shall be and is hereby abrogated and annulled.

Rule 1. Any residuary legatee or next-of-kin may, without serving the remaining residuary legatees or next-of-kin, have a decree for the administration of the personal estate of a deceased person.

Rule 2. Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, may, without serving any other legatee or person interested in the proceeds of the estate, have a decree for the administration of the estate of a deceased person.

Rule 3. Any residuary devisee or heir may, without serving any co-residuary devisee or co-heir, have the like decree.

Rule 4. Any one of the several cestuis que trust under any deed or instrument may, without serving any other of such cestuis que trust, have a decree for the execution of the trusts of the deed or instrument.

Rule 5. In all cases of suits for the protection of property pending litigation, and in all cases in the nature of waste, one person may sue on behalf of himself and of all persons having the same interest.

Rule 6. Any executor, administrator, or trustee may obtain a decree against any one legatee, next-of-kin, or cestui que trust for the administration of the estate, or the execution of the trusts.

Rule 7. In all the above cases the court, if it shall see fit, may require any other person or persons to be made a party or parties to the suit, and may, if it shall see fit, give the conduct of the suit to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

Rule 8. In all the above cases the persons who, according to the present practice of the court, would be necessary parties to the suit, shall be served with notice of the decree, and after such notice they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit, and they may by an order of course have liberty to attend the proceedings under the decree; and any party so served may, within such time as shall in that behalf be prescribed by the General Order of the Lord Chancellor, apply to the court to add to the decree.

Rule 9. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, such trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but the court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties.

An equity of redemption was granted by deed to trustees on trust for certain parties, some of whom were infants; the mortgagee filed a bill for foreclosure against the trustees of the settlement and the adult *cestuis que trust* only as defendants; the court, on motion for a decree for sale, made the decree in the absence of the infant *cestui que trust*, and of the representative of a deceased defendant, on an affidavit by the trustee that it would be for the benefit of the infants: the proceeds ordered into court: (*Siffken v. Davis*, Kay, App. 21.)

As to serving an infant with notice of decree under the 8th rule of sect. 42, see 9 Hare, App. 13.

Where an estate is to be sold under the decree of the court, the general rule (with a possible exception in some cases of extreme difficulty) is that all the parties interested in the proceeds must, to secure a proper and advantageous sale, and protect the title of the purchaser from being open to inquiry or impeachment, be parties to the suit, or be served with notice of the decree under the 8th rule of the 42nd section: (*Doody v. Higgins*, 9 Hare, App. 32.)

On a bill for the execution of the trusts of a will, directing the sale and distribution of the proceeds of real estate, framed according to the old practice, and bringing all the residuary devisees and legatees before the court, held, that the trustee of a settlement of the share of one of the residuary legatees, made on her marriage, ought to be parties; but that the children of the marriage would be sufficiently

represented by such trustees: (*Densem v. Elworthy*, 9 Hare, App. 42.)

In a suit for foreclosure against the infant heir-at-law of the mortgagor, the court refused to act on the 42nd section, dispensing with the parties beneficially interested in the equity of redemption of the mortgaged premises, where the devisees in trust, under the will of the mortgagee, had disclaimed, and there were not before the court any adult parties who could be in possession of funds to redeem the estate: (*Young v. Ward*, 10 Hare, App. 58.)

Representation of *cestuis que trust* of real estate by the trustees, under the 9th rule of section 42, in suits against them for foreclosure or sale, extended to the case of infant *cestuis que trust*, and to trustees of subordinate interests, under settlements of shares of children in remainder, but not otherwise to adult *cestuis que trust*: (*Goldsmid v. Stonehewer*, 9 Hare, App. 38.)

Where, in a suit referred to the Master, it is desired to obtain the advantage of the new powers conferred upon the court by the recent statutes, the proper course is to apply for a transfer of the proceedings to the judges' chambers. The statutes do not give the court power to authorize the Master to avail himself of their provisions: (*Morrell v. Tinkler*, 9 Hare, App. 50.)

The 9th rule of the 42nd section applies not only to administration suits, but to all suits where the interest of the *cestui que trust* is represented by, and his powers are vested in, the trustee: (*Fowler v. Bayldon*, 9 Hare, App. 78.)

Decree for appointment of new trustees and conveyance of the trust estate in a suit by some *cestuis que trust* against the devisee of the last survivor of the former trustees, notice of decree to be served on the other *cestuis que trust*: (*Jones v. James*, 9 Hare, App. 80.)

Where, in a suit instituted to foreclose an estate vested in a trustee, in trust for four persons, who were not parties to the suit, the court held, that the proper course, notwithstanding the suit, was to make them parties.: (*Cropper v. Mellersh*. 1 Jur. (N. S.) 299.)

Where a foreclosure suit was instituted before the act, and stood over in order that the *cestuis que trust*, under the mortgagor's will, might be made parties, held, that after the act, the suit might proceed in their absence, the trustees and executors of the mortgagor representing them sufficiently: (*Sale v. Kitson*, 3 De Gex, Macn. & Gord. 119.)

XLIII. *Practice of setting down a cause on objection for want of parties abolished.*—The practice of the said court of setting down a cause merely on an objection for want of parties to the suit shall be abolished.

XLIV. *Court may proceed in any suit, &c., without representative of deceased person, or may appoint one.*—If in any suit or other proceeding before the court it shall appear to the court that any deceased person who was interested in the matters in question has no legal personal representative, it shall be lawful for the court either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the court shall think fit, either specially or generally by public advertisements; and the order so made by the said court, and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interest to the protection of the court.

A defendant died, and a contest as to one of his testamentary papers prevented probate being granted: the court, on motion, appointed the executors named in his will to represent the deceased's estate in the cause, under the 44th section: (*Hele v. Lord Bexley*, 15 Beav. 340.)

The 44th section of the act does not apply to the case where the estate to which it is desired to appoint a representative, is the estate being administered by the court: (*Silver v. Stein*, 1 Drew. 295.)

A foreclosure decree gave to seven persons, or any of them, the right to redeem within a certain time. Before that time, one of the seven died, and there was difficulty about obtaining letters of administration to him. The Ecclesiastical Court at length gave administration to a creditor, but, before the proceeding was perfected, another creditor entered a caveat. The court made an order under the 44th section of the act appointing the former creditor to represent the estate of the deceased after a week's notice to the opposing creditor; or, if the former creditor should refuse to be such representative, then, upon evidence by affidavit of such refusal, appointing the other creditor to be such representative. Section 44 is only intended to apply to cases where there is a difficulty in obtaining representation, owing to the insolvency of the deceased or some such cause: (*Long v. Storie*, Kay, App. 12.)

A motion upon notice, and an order thereupon, pursuant

to the 44th section, that a suit by creditors interested in the property comprised in a trust deed made for their benefit, might proceed against the trustees without a personal representative of the deceased debtor, the author of the trusts where no such representative existed, and the estate was insolvent : (*Chaffers v. Headlam*, 9 Hare, App. 46.)

The court will not, under the 44th section, dispense with the personal representative of a trustee, when such personal representative has necessarily active duties to perform in the case of the trust : (*Fowler v. Bayldon*, 9 Hare, App. 78.)

The court will not, under the 44th section, in a suit for the administration of an estate, dispense with a personal representative, constituted in the ordinary way, of the testator or intestate whose estate is to be administered in the suit : (*Silver v. Stein*, 1 Drew. 295.)

A personal representative of a deceased party entitled to a small sum of money, not dispensed with under the 44th section, by enabling the solicitors of the deceased party to receive it : (*Rawlins v. McMahon*, 1 Drew. 225.)

On a petition by the heir-at-law of one who was entitled, upon the death of the tenant for life, to lands which had been taken under the Manchester Improvement Act, for payment out of court of the purchase-money of such lands ; the executors named in the will of the deceased party, but who had not proved the will, were, under the 44th section, appointed to represent his personal estate for the purpose of the proceeding : (*Ex parte Cramer*, 9 Hare, App. 47.)

After an order on a claim for administration by residuary legatees, R. S. a defendant, one of the executors, and who was also a residuary legatee, and who had not taken out probate or possessed assets of the testator, died. Upon affidavit that the deceased had left a widow and several children, and that the widow had said her husband had left nothing, and she would not administer, and upon affidavit that it would cost the plaintiff thirty pounds to procure administration to the estate of the deceased, ordered that the suit might proceed without making the personal representative of R. S. a party thereto ; and the court directed the inquiries and accounts directed by the Order of 21st April, 1852, to be prosecuted and taken in like manner as if a legal personal representative of the late defendant R. S. had been served with a writ of summons, and had entered his appearance with the Clerk of Records and Writs as a defendant : (*Rogers v. Jones*, 16 Jur. 968.)

Case in which executors of a father who survived and

became sole next-of-kin of his deceased children, may be appointed by the court, under the 44th section, to represent the estates of the deceased children, for the purposes of the suit: (*Swallow v. Binns*, 9 Hare, App. 47.)

A mortgagee having filed his claim against the heirs in gavelkind of the deceased mortgagor who had died intestate, prayed a sale of the mortgaged premises, and the application of the proceeds, so far as it would extend, in payment of his debt, and the administration of the personal estate and the other real estate of the debtor, for the benefit of the plaintiff and the other unsatisfied creditors; but there was no personal representative of the deceased mortgagor, except an administrator *ad litem*. Held, that the suit could not proceed under the 44th section, in the absence of a personal representative of the intestate, when the object was to administer his estate; and that a testator or intestate whose estate was to be administered, was not intended to be included in the words of the act, and that neither was the administrator *ad litem* a sufficient representative, where the object was not merely to bind but to administer the estate: (*Goors v. Levie*, 16 Jur. 1061.)

XLV. *Creditor, &c., may summon executor, &c., to show cause why an order for administration of personal estate should not be granted—Power to judge to order administration of such estate.*—It shall be lawful for any person claiming to be a creditor, or a specific pecuniary or residuary legatee, or the next-of-kin, or some or one of the next-of-kin of a deceased person, to apply for and obtain as of course, without bill or claim filed, or any other preliminary proceedings, a summons from the Master of the Rolls or any of the Vice-Chancellors requiring the executor or administrator, as the case may be, of such deceased person, to attend before him at chambers, for the purpose of showing cause why an order for the administration of the personal estate of the deceased should not be granted; and upon proof by affidavit of the due service of such summons, or on the appearance in person or by his solicitor or counsel of such executor or administrator, and upon proof by affidavit of such other matters, if any, as such judge shall require, it shall be lawful for such judge, if in his discretion he shall think fit so to do, to make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case may require; and the order so made shall have the force and effect of a decree to the like effect made on the hearing of a cause or claim between the same parties: provided that such judge have full discretionary power to grant or refuse such order, or to give any special directions touching the carriage or execution of such order, and in the case of applications for any such order by two or more different persons or classes of persons, to grant the same to such one or more of the claimants or of the classes of claimants as he may think

fit; and if the judge shall think proper, the carriage of the order may subsequently be given to such party interested, and upon such terms as the judge may direct.

An order was made against an executor in chambers, for taking the accounts, the executor insisted on a release. Held, that there being no jurisdiction to set aside the release on summons, the order was irregular: (*Acaster v. Anderson*, 19 Beav. 161.)

The Master of the Rolls or a Vice-Chancellor has jurisdiction, under this section, to make an order in chambers, upon summons, to administer the effects bequeathed by a married woman under a power contained in a deed: (*Sewell v. Ashley*, 3 De Gex, Macn. & Gord. 933.)

XLVI. *Copy of summons to be filed in Record Office of court.*—A duplicate or copy of such summons shall, previously to the service thereof, be filed in the Record Office of the said court; and no service thereof upon any executor or administrator shall be of any validity unless the copy so served shall be stamped with a stamp of such office indicating the filing thereof; and the filing of such summons shall have the same effect with respect to *lis pendens* as the filing of a bill or claim.

XLVII. *Creditor, &c., may obtain an order for administration of real estate.*—It shall be lawful for any person claiming to be a creditor of any deceased person, or interested under his will, to apply for and obtain in a summary way, in the manner hereinbefore provided with respect to the personal estate of a deceased person, an order for the administration of the real estate of the deceased person where the whole of such real estate is by devise vested in trustees who are by the will empowered to sell such real estate, and authorized to give receipts for the rents and profits thereof, and for the produce of the sale of such real estate; and all the provisions hereinbefore contained with respect to the application for such order in relation to the personal estate of a deceased person, and consequent thereon, shall extend and be applicable to an application for such order as last hereinbefore mentioned with respect to real estate.

Distinction as to the necessity of making persons beneficially interested in real estate, parties in suits by mortgagees for foreclosure or sale of mortgaged estates, against persons having the legal interest only, when such persons are executors of the mortgagor, and when they are merely trustees of settlements of the mortgaged property: (*Hanman v. Riley*, 9 Hare, App. 40.)

XLVIII. *Court may direct sale of mortgaged property instead of a foreclosure on such terms as it may think fit.*—It shall be lawful

for the court in any suit for the foreclosure of the equity of redemption in any mortgaged property, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, to direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the court may think fit to direct, and if the court shall so think fit, without previously determining the priorities of incumbrances, or giving the usual or any time to redeem; provided that if such request shall be made by any such subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the court shall not direct any such sale, without the consent of the mortgagee or the persons claiming under him, unless the party making such request shall deposit in court a reasonable sum of money, to be fixed by the court, for the purpose of securing the performance of such terms as the court may think fit to impose on the party making such request.

The court has no power to order a sale, under the 48th section of the Chancery Improvement Act, on an interlocutory application, but only where, before the act, foreclosure would have been decreed: (*Wayn v. Lewis*, 1 Drew. 127.)

Directions for sale of an infant's estate in a foreclosure suit, showing it clearly to be for the benefit of the infant, without giving time to redeem: (10 Hare, App. 51.)

Application by the mortgagee, for sale instead of foreclosure, form of order for foreclosure taken by consent without accounts: (*Boydell v. Manby*, 9 Hare, App. 53.)

A sale of mortgaged premises consisting of freehold and leasehold premises, and a policy of life insurance, ordered in a foreclosure suit at the request of the mortgagee. The mortgagors were bankrupt, and the suit was against their assignees and against incumbrancers subsequent to the plaintiff. The decree directed the account of what was due to the several incumbrancers, and directed the proceeds of the defendant's property to be distinguished: (*Cates v. Reeves*, 16 Jur. 1004.)

An order for sale made in a claim for foreclosure at the request of the mortgagee; such sale to be one month after the judge's clerk shall have made his certificate of the amount of principal, interest, and costs due to the mortgagee, if such amount shall not be paid: (*Staines v. Rudlin*, 16 Jur. 965.)

The court refused, on the application of the mortgagee, after a decree of foreclosure had been made, to vary the decree by directing a sale under the 48th section: (*Girdlestone v. Lavender*, 9 Hare, App. 53.)

XLIX. *Suit not to be dismissed for misjoinder of plaintiffs, but court may modify its decree, according to special circumstances.*—No suit in the said court shall be dismissed by reason only of the misjoinder of persons as plaintiffs therein, but wherever it shall appear to the court that, notwithstanding the conflict of interest in the co-plaintiffs, or the want of interest in some of the plaintiffs, or the existence of some ground of defence affecting some or one of the plaintiffs, the plaintiffs, or some or one of them, are or is entitled to relief, the court shall have power to grant such relief, and to modify its decree, according to the special circumstances of the case, and for that purpose to direct such amendments, if any, as may be necessary, and at the hearing, before such amendments are made, to treat any one or more of the plaintiffs as if he or they was or were a defendant or defendants in the suit, and the remaining or other plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record; and where there is a misjoinder of plaintiffs, and the plaintiff having an interest shall have died leaving a plaintiff on the record without an interest, the court may, at the hearing of the cause, order the cause to stand revived as may appear just, and proceed to a decision of the cause, if it shall see fit, and to give such directions as to costs or otherwise as may appear just and expedient.

L. *No suit to be objected to because only declaratory order sought.*—No suit in the said court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of right without granting consequential relief.

Case in which the court made a declaratory decree under this section: (*Fletcher v. Rogers*, 10 Hare, App. 13.)

This section does not give the court jurisdiction to make a decree merely declaratory of a legal right: (*Trustees of Birkenhead, &c. v. Laird*, 4 De Gex, Macn. & Gord. 732.)

A lease was granted by A. to two partners, the covenants being only joint at law. Bill filed by the representative of one of the lessees, deceased, against the lessees, alleging that the lessee claimed to have a right under the covenants against the plaintiff, if a breach should arise, and praying merely a declaration that the defendant had no right. A demurrer to this bill was allowed: (*Jackson v. Turnley*, 1 Drew. 617.) The meaning of this section is only to remove the objection that a plaintiff who might have consequential relief, prays merely a declaration of right; it does not mean to entitle a person to have a declaration as to a claim which *may* be made another under circumstances which may or may not happen.

LI. *Court may decide between some of the parties without making others interested parties to the suit—Proviso.*—It shall be lawful for

the court to adjudicate on questions arising between parties notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen, or that the property in question is comprised with other property in the same settlement, will, or other instrument, without making the other parties interested in the property respecting which the question may have arisen, or interested under the same settlement, will, or other instrument, parties to the suit, and without requiring the whole trusts and purposes of the settlement, will, or other instrument to be executed under the direction of the court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions may have arisen: provided always, that if the court shall be of opinion that the application is fraudulent or collusive, or for some other reason ought not to be entertained, it shall have power to refuse to make the order prayed.

Case of a decree for the purpose of carrying into effect an arrangement as to part of the estate of a testator, without administering the estate, or executing the trusts of the will generally: (*Prentice v. Prentice*, 10 Hare, App. 22.)

The 51st section of the act which empowers the court to adjudicate on questions between some, only, of the parties, does not render the decision binding on the absent parties, as the 42nd section does, where notice of the decree has been served under the 8th rule: (*Doody v. Higgins*, 9 Hare, App. 32.)

LII. *In case of abatement, &c., of suit an order may be made, which shall have same effect as a bill of revivor.*—Upon any suit in the said court becoming abated by death, marriage, or otherwise, or defected by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings; but an order to the effect of the usual order to revive or of the usual supplemental decree may be obtained as of course upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability; and an order so obtained, when served upon the party or parties who according to the present practice of the said court would be defendant or defendants to the bill of revivor or supplemental bill, shall from the time of such service be binding on such party or parties in the same manner in every respect as if such order had been regularly obtained according to the existing practice of the said court; and such party or parties shall thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto in the office of the Clerks of Records and Writs, within such time and in like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him: provided that it shall be open to the party or parties so served, within such time after service as

shall be in that behalf prescribed by any General Order of the Lord Chancellor, to apply to the court by motion or petition to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill, stating the previous proceedings in the suit and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon: provided also, that if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party until a guardian or guardians *ad litem* shall have been duly appointed for such party, and such time shall have elapsed thereafter as shall be prescribed by any General Order of the Lord Chancellor in that behalf.

One of two creditors, plaintiffs in a creditors' suit, upon an abatement by the death of an executor of the trustees, obtained letters of administration *de bonis non* to the estate of the testator, and leave was given to the other creditor to file a supplemental claim against him and the executors of the deceased executor, the case not being within the 52nd section of the 15 & 16 Vict. c. 86. which gives to an order on motion the effect of a supplemental decree: (*Tate v. Leithead*, 9 Hare, App. 51.)

Order on motion *ex parte* by the plaintiff, to revive and carry on proceedings in an administration suit upon abatement, by the death of the executor, under the 52nd section of the act, upon allegation without proof of the facts constituting the abatement: (*Martin v. Hadlow*, 9 Hare, App. 52.)

Where the case is one in which the order to revive only is necessary, and not an order to the effect of a supplemental decree, the motion is of course, and does not require to be mentioned to the court: (*Bonfil v. Purchase*, 9 Hare, App. 52.)

An order to the effect of a supplemental decree made under the 52nd section of the act, where the interest of an infant plaintiff has been transmitted to the trustees of a settlement, made under the direction of the court in consequence of her marriage: (*Athinson v. Parker*, 16 Jur. 1005.)

A creditor, who had proved his debt in the cause, applied for and obtained an order under the 52nd section, for the order to revive and carry on the proceedings, the suit having abated by the death of the plaintiff, the court being of opinion that the benefit of the claim was not confined to the parties to the suit: (*Lowes v. Lowes*, 16 Jur. 689.)

The birth of one of a class entitled as such after the insti-

tution of a suit, is within the 52nd section of the act, and justifies an order for the usual supplemental decree: (*Fullerton v. Martin*, 1 Drew. 238.)

Order in the nature of a supplemental decree, for a creditor who had proved his debt, to carry on a creditor's suit where the original plaintiff had become bankrupt: (*English v. Hayman*, 9 Hare, App. 88.)

The 52nd section enables the court to make an order to the effect of the usual supplemental decree, where the object is to bring before the court the trustees under a settlement of the property of an infant plaintiff, made after the institution of the suit: (*Atkinson v. Parker*, 2 De Gex, Macn. & Gord. 221.)

Revivor of a suit before decree to be by bill, and not by order under the 52nd section: (10 Hare, App. 31.)

Order giving leave to the plaintiff to enter an appearance for the assignees of a bankrupt defendant, made parties under the 52nd section, after due service of such order and non-appearance: (*Cross v. Thomas*, 17 Jur. 336.)

After substituted service of an order to revive, obtained under the 52nd section, and made upon the solicitor of the defendant, under an order of the court for that purpose, the defendant being out of the jurisdiction, the court, on the application of the plaintiff, ordered an appearance to be entered for the same defendant who had not appeared: (*Foster v. Menzies*, 17 Jur. 657.)

Upon service on the defendant of an order to revive, obtained by the plaintiff under the 52nd section, after decree, the suit may proceed without an appearance by such defendant: (*Ward v. Cartwright*, 10 Hare, App. 73.)

Order made, under the 52nd section, for the prosecution of a suit against the assignees of a defendant become bankrupt after appearance, but before answer, with liberty for the assignees to answer if they should be so advised: (*Lash v. Miller*, 4 De Gex, Macn. & Gord. 841.)

LIII. *New facts, &c., after commencement of suit, to be introduced as amendments to bill, &c.*—It shall not be necessary to exhibit any supplemental bill in the said court for the purpose only of stating or putting in issue facts or circumstances which may have occurred after the institution of any suit; but such facts or circumstances may be introduced by way of amendment into the original bill of complaint in the suit if the cause is otherwise in such a state as to allow of an amendment being made in the bill, and if not, the plaintiff shall be at liberty to state such facts or circumstances on the record, in such manner and subject to such rules and regulations with respect to the proof thereof, and the affording the defendant leave and opportunity of

answering and meeting the same as shall in that behalf be prescribed by any General Order of the Lord Chancellor.

The defendant, although he has the conduct of the decree, is not, therefore, entitled, under the 53rd section of the statute and 44th General Order of August, 1852, to file a statement of facts or circumstances occurring after the institution of the suit to be annexed to the bill: (*Lee v. Lee*, 9 Hare, App. 91.)

Semble, in some cases a child born after decree in a suit may be brought before the court by supplemental order without a supplemental bill: (*Notley v. Palmer*, 1 Jur. (N. S.) 221.)

The 53rd section has no application after decree, nor before decree for bringing new parties before the court, but only for bringing forward new facts between the same parties. If new parties are to be brought before the court, there must be a supplemental bill: (*Commerill v. Hall*, 2 Drew. 194.)

LIV. *Where account required to be taken, court may give special directions as to the mode of taking same.*—It shall be lawful for the court, in any case where any account is required to be taken to give such special directions, if any, as it may think fit with respect to the mode in which the account should be taken or vouched, and such special directions may be given, either by the decree or order directing such account, or by any subsequent order or orders, upon its appearing to the court that the circumstances of the case are such as to require such special directions; and particularly it shall be lawful for the court, in cases where it shall think fit so to do, to direct that in taking the account the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised.

The meaning of this section is, that where vouchers have been lost, or the accounts cannot be taken in the ordinary way, the court may give special directions, but such directions will not be given unless it appears that the ordinary evidence cannot be had, or merely to save expense. *Semble*, that the section does not operate retrospectively: (*Lodge v. Pritchard*, 3 De Gex, Macn. & Gord. 906.)

Where plaintiffs were brokers, having transacted business for the defendants, and the clerk of the plaintiffs had made entries in his books of matters transacted by the plaintiffs, communicated to him immediately after their transaction, the clerk being dead, and there being proof external and

internal that the books were regularly kept, they were admitted under the 54th section as *primâ facie* evidence: (*Ewart v. Williams*, 3 Drew. 21.)

LV. *Court may order real estate to be sold, if required.*—If after a suit shall have been instituted in the said court in relation to any real estate it shall appear to the court that it will be necessary or expedient that the said real estate or any part thereof should be sold for the purposes of such suit, it shall be lawful for the said court to direct the same to be sold at any time after the institution thereof, and such sale shall be as valid to all intents and purposes as if directed to be made by a decree or decretal order on the hearing of such cause; and any party to the suit in possession of such estate, or in receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser or such other person as the court shall direct.

This section is applicable only to cases in which, for the protection of property or other like cause, it is necessary to apply to the court for a sale; and it was not intended to enable parties in a contested suit to obtain upon an interlocutory application before the hearing a decision upon the question in contest: (*Prince v. Cooper*, 16 Beav. 546.)

This section only gives power to direct a sale, before the hearing in those cases in which the court could, under the old practice, have given such directions at the hearing: (*Mandeno v. Mandeno*, Kay, App. 2.)

LVI. *Before sale of estate abstract of title to be laid before some conveyancing counsel*—Time for delivery of abstract to be specified in conditions of sale.—Before any estate or interest shall be put up for sale under a decree or order of the Court of Chancery, an abstract of the title thereto shall, with the approbation of the court, be laid before some conveyancing counsel to be approved by the court, for the opinion of such counsel thereon, to the intent that the said court may be the better enabled to give such directions as may be necessary respecting the conditions of sale of such estate or interest, and other matters connected with the sale thereof; and when an estate or interest shall be so put up for sale, a time for the delivery of the abstract of title thereto to the purchaser or his solicitor shall be specified in the said conditions of sale.

LVII. *Where real or personal property is the subject of proceedings, court may allow to parties part or the whole of the annual income.*—Where any real or personal property shall form the subject of any proceedings in the Court of Chancery, and the court shall be satisfied that the same will be more than sufficient to answer all the claims thereon which ought to be provided for in such suit, it shall be lawful for the said court at any time after the commencement of such proceedings to allow to the parties interested therein, or any one or more of them, the whole or part of the annual income of such real property, or

a part of such personal property, or a part or the whole of the income thereof, up to such time as the said court shall direct, and for that purpose to make such orders as may appear to the said court necessary or expedient.

An allowance of income *pendente lite*, under this section, will only be made upon the admission by the executors of assets: (*Knight v. Knight*, 16 Beav. 358.)

LVIII. *Practice as to injunctions to stay proceedings at law to be assimilated to practice as to special injunctions.*—The practice of the Court of Chancery with respect to injunctions for the stay of proceedings at law shall, so far as the nature of the case will admit, be assimilated to the practice of such court with respect to special injunctions generally, and such injunctions may be granted upon interlocutory applications supported by affidavit, in like manner as other special injunctions are granted by the said court.

Practice under the statute in cases of injunctions to stay proceedings at law.

Though a party may now at law examine his opponent, he is still entitled to discovery in equity in aid of his case at law.

Where the plaintiff, in a bill of discovery in aid of a defence at law, has a *bonâ fide* case, verified by affidavit, showing that information may be given by the answer, which may assist him in wholly or partially destroying the case made against him at law, he is entitled to that discovery, and to an injunction until the discovery is given: (*Lovell v. Gal- loway*, 17 Beav. 1.)

The practice as to common injunctions is not in all respects assimilated to that in cases of special injunctions. A *primâ facie* case, supported by affidavit, is now required to entitle a plaintiff to the common injunction. And, although that case be met by affidavits of the defendant, denying the equity of the bill, still the plaintiff is entitled to an injunction to stay proceedings at law until answer, in order to secure to him the benefit of a full discovery, in aid of his defence at law: (*Senior v. Pritchard*, 16 Beav. 473.)

LIX. *Answer of defendant, on motion for injunction or receiver, &c., to be regarded as an affidavit.*—Upon application by motion or petition to the court in any suit depending therein for an injunction or a receiver, or to dissolve an injunction, or discharge an order appointing a receiver, the answer of the defendant shall, for the purpose of evidence on such motion or petition, be regarded merely as an affidavit of the defendant, and affidavits may be received and read in opposition thereto.

LX. *In case directions as to practice, &c., not followed, court may make order and award costs.*—In case any of the directions herein contained with respect to the practice and course of proceeding in the said Court of Chancery, shall by mistake of parties fail to be followed in any suit or proceeding in the said court, it shall be lawful for the said court, if it shall think fit, upon payment of such costs as such court shall direct, to make such order giving effect to and rectifying such proceedings as may be justified by the merits of the case.

LXI. *Court of Chancery not to direct cases to be stated for opinions of Court of Common Law, but to decide the same.*—It shall not be lawful for the said Court of Chancery, in any cause or matter, to direct a case to be stated for the opinion of any Court of Common Law, but the said Court of Chancery shall have full power to determine any questions of law, which in the judgment of the said Court of Chancery shall be necessary to be decided previously to the decision of the equitable question at issue between the parties.

LXII. *Court may determine legal title of party seeking relief without requiring parties to proceed to law.*—In cases where, according to the present practice of the Court of Chancery, such court declines to grant equitable relief until the legal title or right of the party or parties seeking such relief shall have been established in a proceeding at law, the said court may itself determine such title or right without requiring the parties to proceed at law to establish the same.

LXIII. *Lord Chancellor and judges to make General Rules and Orders for carrying purposes of this act into effect.*—The Lord Chancellor, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors, or any three of them, may and they are hereby required from time to time to make General Rules and Orders for carrying the purposes of this act into effect, and for regulating the times and form and mode of procedure, and generally the practice of the said court, in respect of the matters to which this act relates, and for regulating the fees and allowances to all officers of the said court and solicitors thereof in respect to such matters and so far as may be found expedient for altering the course of proceeding hereinbefore prescribed in respect to the matters to which this act relates, or any of them; and such rules and orders may from time to time be rescinded or altered by the like authority; and all such rules and orders shall take effect as General Orders of the said court.

LXIV. *Such General Rules and Orders to be laid before Parliament.*—All General Rules and Orders of the Lord Chancellor, with such advice and assistance as aforesaid, shall immediately after the making and issuing thereof be laid before both Houses of Parliament, if Parliament be then sitting, or if Parliament be not then sitting, within five days after the next meeting thereof: provided always, that if either of the Houses of Parliament shall, by any resolution passed within thirty-six days after such rules or orders have been laid before such Houses of Parliament, resolve that the whole or any part of such rules or orders ought not to continue in force, in such case the whole or such part thereof as shall be so included in such resolution, shall, from and after such resolution, cease to be binding.

LXV. *Power to Lord Chancellor to increase salaries of examiners.—*If examiner decline to continue, Lord Chancellor may order a certain annuity to be paid to him.—And whereas the present examiners of the court have been heretofore appointed for the purpose only of taking the depositions of witnesses in private, and upon written interrogatories prepared by counsel; and whereas the public examination of witnesses orally, under the provisions of this act, will materially alter the nature of the duties and increase the responsibility of the said examiners; be it therefore enacted, that it shall be lawful for the Lord Chancellor and he is hereby empowered to order and direct a sum to be paid to each of the said examiners, out of the fund intituled “The Suitor’s Fund,” from and after the first of November one thousand eight hundred and fifty-two, such a sum as shall together with the sums now payable make up the annual sum of one thousand five hundred pounds: provided always, that if either of the present examiners should feel himself unable or should decline to continue his services in the same office upon the conditions provided under this act, it shall be lawful for the Lord Chancellor to order to be paid to such examiner retiring an annuity of an amount not exceeding three-fourths of the salary which he has hitherto received.

LXVI. *Construction of terms.*—In the construction of this act the words “bill of complaint” shall mean also and include information; the word “affidavit” shall mean also and include affirmation; the expression “Lord Chancellor” shall mean and include the Lord Chancellor, Lord Keeper, and Lords Commissioners of the Great Seal of the United Kingdom for the time being; and the expression “General Order of the Lord Chancellor” shall mean General Order of the Lord Chancellor with such advice and assistance as aforesaid.

LXVII. *Commencement of act.*—This act shall commence and take effect from and after the first day of November one thousand eight hundred and fifty-two; provided that it shall be lawful for the Lord Chancellor, with such advice and assistance as aforesaid, to make and issue any such General Rules or Orders as aforesaid at any time after the passing of this act, so as the same be not made to take effect before the time appointed for the commencement of this act.

Cases on the statute generally.

On the examination of witnesses orally under this act, if a document is put into the hands of a witness by a party examining him, the other side may require to see the document.

I. If the witness is examined on its contents generally; or if, although the document is originally shown to the witness merely to refresh his memory, questions are afterwards put relating to its contents.

II. He may not require to see the document. If the document is merely put into the hands of the witness to refresh his memory. Nor if he is examined merely to prove the handwriting: (*Lord v. Colvin*, 2 Drew. 205.)

Amendment of a petition the necessity for which was created by the marriage of the petitioner, without a fresh stamp : (*Robinson v. Harrison*, 1 Drew. 307.)

Evidence of the propriety of a sale of an estate by private consent, will be heard and approved of in court, without a reference to chambers : (*Pimm v. Insall*, 10 Hare, App. 74.)

The examiner of the court, or a special examiner, will be appointed to take the examination of a sick witness as occasion may require : (*Pillan v. Thompson*, 10 Hare, App. 76.)

Application for appointment of a guardian to concur in a special case made in court and not by a summons in chambers : (*Thoruhill v. Coplestone*, 10 Hare, App. 67.)

It is at the option of a party, who is dissatisfied with a certificate of the Chief Clerk, to have his objections to it argued before the judge in chambers, or in open court. But where objections have been argued before a judge in chambers, no rehearing will be allowed in open court, except under special circumstances : (*York and North Midland Railway Company v. Hulson*, 17 Jur. 1090.)

Parties out of the jurisdiction must be served with notice of the decree in a suit commenced by summons out of chambers : (*Strong v. Moore*, 22 L. T. 917.)

The 22nd section of the Common Law Procedure Act, 1854, authorizing a party to discredit his own adverse witness, applies to the Court of Chancery, and to an examination not in court, but before an examiner ; but the leave to produce counter evidence must be given not by the examiner, but by the judge on special motion.

An examiner in Chancery has no authority to determine questions as to the relevancy or adverse nature of the evidence of a witness, but when the question as to his being adverse is likely to be raised, the examiner should take down the questions as well as the answers, upon which counter evidence may be required : (*Buckley v. Cook*, 1 Kay & T. 29.)

Mode of appealing from the certificate of a judge's chief clerk made in conformity with an opinion expressed by the judge : (*Rhodes v. Ibbetson*, 4 De Gex, Macn. & Gord. 787.)

The court refused to direct the oral examination of a party to the cause under a decree which had been made directing accounts and inquiries before the new Procedure Act came into operation : (*Sherwood v. Vincent*, 9 Hare, App. 19.)

An application to enlarge publication, seeking also other directions, made in court ; if it had been to enlarge time only it should be in chambers : (*Atkinson v. Oxford, &c. Railway Company*, 9 Hare, App. 19.)

No direction is now necessary in a decree for liberty to state special circumstances: (*Williamson v. Jeffreys*, 9 Hare, App. 56; *Attorney-General v. Attwood*, *ibid.*)

Form of order appointing an examiner in several colonies in Australia: (*Crofts v. Middleton*, 9 Hare, App. 75.)

Numerical statements in bills may be printed in figures and not in words at length: (*Anon.* 9 Hare, App. 83.)

Cases in which inquiries in chambers may be prosecuted or made with or without an order of the court having been drawn up directing such inquiries: (*Kelson v. Kelson*, 9 Hare, App. 86.)

15 & 16 VICT. CAP. 80.

An Act to abolish the Office of Master in Ordinary of the High Court of Chancery, and to make provision for the more speedy and efficient despatch of Business in the said Court.—[30th June, 1852.]

I. *Office of Masters in Ordinary in Chancery abolished.*—The office of Master in Ordinary of the High Court of Chancery shall be and the same is hereby abolished, but reserving and subject to the execution by the present Masters in Ordinary of the said court, as such, of the duties hereinafter provided for; and until they are released under this act they shall, for the performance of such duties, continue to have all the powers conferred upon them by any act of Parliament, or otherwise vested in them.

II. *Vacancies in office of Masters not to be filled up.*—No vacancy which has already occurred or may hereafter occur in the office of Master in Ordinary of the said court shall be filled up, nor shall any future accountant-general be made or become one of the Masters in Ordinary.

III. *Two of the Masters in Ordinary released from their duties on first day of Michaelmas Term, 1852, &c.*—*Proviso as to certain matters depending before the said Masters.*—On the first day of Michaelmas Term one thousand eight hundred and fifty-two, James William Farrar, Esquire, and William Brougham, Esquire, two of the Masters in Ordinary of the said court, shall be released from their duties as such Masters; and as often thereafter as, in the judgment of the Lord Chancellor, from the state of business in the said court, any other Master or Masters can be spared, it shall be lawful for the Lord Chancellor to release any

such Master or Masters at such time or times as to him shall seem meet: provided always, that nothing in this act contained shall extend to release, or to authorize the Lord Chancellor to release, any of the Masters from attendance upon the House of Lords without the order of the House: provided also, that if, from the nature of any particular matter or matters depending before either of the said Masters hereinbefore respectively named, it shall in the opinion of the Lord Chancellor be desirable that such matter or matters should be worked out by or before the same Master before whom the same shall be depending, it shall be lawful for the Lord Chancellor to direct such Master to continue the prosecution of such matter or matters, and such Master shall prosecute the same accordingly, in the same manner and with the same powers in every respect as if he had not been released from his duties under this act.

IV. *Option to Masters to retire according to seniority, &c.—Power to Lord Chancellor to release remaining Masters.*—Every Master to be released by the Lord Chancellor shall have the option to retire tendered to him according to his seniority in office; and if any such Master shall, for one calendar month after such option tendered to him, neglect or decline to avail himself thereof, then the Lord Chancellor may tender the like option to the next in succession in seniority in office, and so *toties quoties*; but when the Lord Chancellor shall be of opinion that the services of none of the Masters are any longer necessary for the due execution of the business of the said court, it shall be lawful for him to release every remaining Master.

V. *Master's salaries and compensation allowance continued by way of retiring pensions, &c.*—Each one of the Masters to be so released on the first day of Michaelmas Term one thousand eight hundred and fifty-two, shall nevertheless continue entitled to receive during his life, by way of retiring pension, the full amount of his salary as such Master, including the amount of the compensation allowance payable to him as such Master; and every Master who may be so released subsequently to the same first day of Michaelmas Term one thousand eight hundred and fifty-two, shall also continue entitled to receive by way of retiring pension the full amount of his salary as such Master.

VI. *Retiring pensions, &c., to be paid in the same manner as present salaries.*—The salaries or retiring pensions and compensation allowances payable to the Masters so to be released shall continue or be payable out of the same funds, on the days, and in the same manner in all respects, as their present salaries and compensation allowances respectively.

VII. *Power to Masters to summon parties, &c., and to settle and wind up proceedings before them.*—In order as expeditiously as may be to wind up all the causes, matters, and things which may from time to time be depending before or have been referred to the Masters in Ordinary of the said court, it shall be lawful for every Master, at any time after the passing of this act, to summon as he shall deem fit all or any of the parties to any cause, matter, or thing so depending, or their solicitors, and thereupon to proceed with such cause, matter, or

thing, and give such directions and make such order as he may think necessary for the purpose of settling and winding up the same; but any such order shall be subject to be discharged or varied by the court upon application made for that purpose: and the Master shall be at liberty to proceed for the purposes aforesaid in the absence of any of the parties or solicitors neglecting or refusing to attend the summons.

VIII. *Power to court, upon Master's report or certificate, to make order for prosecution or final disposal of any suit, &c., and for payment of costs, &c.*—In case the Master shall be unable, by reason of the conduct of parties, or otherwise, to finally dispose of any cause, matter, or thing, he shall be at liberty to dispose of any part thereof within his power, and to report and certify on the whole of the case; and upon such report or certificate the court shall make such order as it shall think proper on all or any of the parties, for the further prosecution of the suit or matter, or for the final disposal thereof, and for the payment of the costs thereof, including any of the costs which may have been incurred by reason of the conduct of the parties.

IX. *On neglect of parties to bring Master's report before the court, solicitor to Suits' Fee Fund to do so, and his costs provided for.*—In the event of the parties in any cause, matter, or thing, or their solicitors, refusing or neglecting, within a time to be fixed by the Master, to bring the Master's report or certificate before the court, the same may, by direction of the Master, be brought before the court by the solicitor for the time being to the Suits' Fund; and the court is hereby empowered to order payment of the costs and expenses of the solicitor to the Suits' Fund out of such of the funds in the cause, matter, or thing, or by such parties as to the court shall seem just; and in case payment thereof cannot be obtained by any of the means aforesaid, the same, by the direction of the court, may be paid out of the Suits' Fund.

X. *No fresh references to Masters, except in cases already before them, and in matters under Winding-up Acts, 1848 and 1849—Until all the Masters are released from their duties, those remaining shall prosecute all the business depending—Power now vested in Masters reserved to them for such purposes.*—From and after the first day of Michaelmas Term one thousand eight hundred and fifty-two no reference shall be made to any of the Masters in Ordinary of the said court, except in cases in which, from some previous reference made in the cause or matter, or in some other cause or matter connected therewith, the court may think it expedient to make such reference, and except in matters arising under the Joint Stock Companies Winding-up Acts, 1848 and 1849: provided always, that until all the Masters in Ordinary of the said court shall have been removed by resignation, death or otherwise, or have been released from their duties under this act, such of the Masters in Ordinary of the said court as shall for the time being remain in office, and shall not be released from their duties under this act, shall prosecute all the business which on the first day of Michaelmas Term one thousand eight hundred and fifty-two shall be depending before the Masters, and also all the references which before the said first day of Michaelmas Term one thousand eight hundred and fifty-two shall have been made under decrees or orders of the court, or which

on or after the same first day of Michaelmas Term shall be made in relation to such excepted matters as aforesaid; and the same, if necessary, shall be distributed amongst such remaining Masters in such manner as the Lord Chancellor shall direct; and the powers and authorities now vested in them are hereby reserved to them for the purpose of executing and performing all the duties, matters, and things which may be still referred to them, or which they may be lawfully called upon to perform.

XI. *Power to Master of the Rolls and Vice-Chancellors to sit at chambers for the despatch of business, &c.*—From and after the first day of Michaelmas Term one thousand eight hundred and fifty-two it shall be lawful for the Master of the Rolls and the Vice-Chancellors for the time being and they are hereby required to sit at chambers for the despatch of such part of the business of the said court as can, without detriment to the public advantage arising from the discussion of questions in open court, be heard in chambers, according to the directions hereinafter in that behalf specified or referred to; and the times at and during which they respectively shall so sit shall be from time to time fixed by them respectively.

XII. *Power to Lord Chancellor to provide chambers for the Masters of the Rolls and Vice-Chancellors.*—The chamber business of the Master of the Rolls and of every Vice-Chancellor shall be carried on in conjunction with his court business; but as no rooms are attached to the courts of the Vice-Chancellors in which such chamber business can be transacted, it shall be lawful for the Lord Chancellor to cause chambers to be provided for every of them respectively for that purpose until courts with proper rooms attached can be provided for them.

XIII. *Judges to have same power and jurisdiction as in open court.*—The Master of the Rolls and every of the Vice-Chancellors respectively when sitting in chambers shall have the same power and jurisdiction in respect of the business to be brought before them, as if they were respectively sitting in open court.

XIV. *Orders made in chambers to be ordinarily drawn up by judges clerk, but judges may direct them to be drawn up by registrars of the court, and may require their attendance at chambers for the purpose.*—The orders made by the Master of the Rolls and Vice-Chancellors respectively when sitting in chambers shall ordinarily be drawn up there by their respective clerks, to be appointed as hereinafter mentioned, but with power to each of such judges to direct any of such orders to be drawn up by the registrar of the said court in like manner as orders made by a judge of the said court in open court are drawn up, for which purpose the registrars of the said court shall, when required, attend the Master of the Rolls and the Vice-Chancellors respectively when sitting at chambers in such order and manner as shall be found most convenient for furthering the business of the said court, and as the Lord Chancellor, with the concurrence of the Master of the Rolls and Vice-Chancellors, or any two of them, shall from time to time by any general order direct.

XV. *Orders made at chambers to have same force as orders of court, &c.*—All orders of the Master of the Rolls or of any Vice-Chancellor,

made by him at chambers, shall, have the force and effect of orders of the Court of Chancery, and such orders may be signed and enrolled in like manner.

XVI. *Power to judges to appoint two Chief Clerks to each court to assist in the business of the court.*—It shall be lawful for the Master of the Rolls, and every of the Vice-Chancellors for the time being respectively, with the approbation of the Lord Chancellor, to appoint two Chief Clerks each to be respectively attached to each judge and his successors in office, for the purpose of assisting in the general business of each court, and the causes and matters belonging thereto, and on any vacancy in such office of Chief Clerk to supply such vacancy.

XVII. *Chief Clerk to judges to have been Chief Clerks to Masters in Ordinary, or solicitors or attorneys of ten years' practice*—*Certain Chief Clerks to be Chief Clerks of three of the equity judges.*—No person shall be appointed Chief Clerk to the Master of the Rolls or any Vice-Chancellor unless he shall have been Chief Clerk to one of the Masters in Ordinary of the said court, or have been admitted on the roll of solicitors or attorneys in one of the courts at Westminster Hall, and practised as such solicitor or attorney for the period of ten years at least immediately preceding his appointment: provided always, that George Whiting and Henry Leman, the present Chief Clerks of the said Masters hereby released as aforesaid, and Charles Pugh, Chief Clerk in the office of the Master now vacant, shall on the said first day of Michaelmas Term one thousand eight hundred and fifty-two become and they are hereby appointed Chief Clerks of three of the said equity judges, and their respective successors in office.

XVIII. *Power to judges to appoint junior clerks.*—It shall be lawful for the judge of each court to appoint a junior clerk to each Chief Clerk of his court, and on any vacancy in such office to supply such vacancy.

XIX. *Power to Lord Chancellor to remove any officer appointed under this act engaging in other employment or accepting any fee or emolument whatever other than his salary.*—If any person who shall accept any office under this act shall engage in any other employment whatever whilst he holds such office, or shall receive any sum of money or benefit other than his salary and what may be allowed or directed to be taken by him under any act of Parliament or order of the said court or of the Lord Chancellor, for any act done or pretended to be done, or any attendance given or pretended to be given, either with or without the consent or direction or pretended consent or direction of the judge, in relation to or arising out of any proceeding in his office, or in any office of or connected with the Court of Chancery, or if such person, being or having been a solicitor or attorney, shall directly or indirectly receive or secure to himself any continuing benefit from any business or firm in which he may have been engaged previously to his appointment to such office, the person so offending may be removed from his office by order of the Lord Chancellor, and shall be rendered incapable of afterwards holding any office, situation, or employment in the said court.

XX. *Solicitors, &c., appointed to any office under this act to be struck off the rolls.*—Every solicitor or attorney who shall be appointed to and shall accept any office under this act shall cease to be an attorney or

solicitor, and shall forthwith procure himself to be struck off the roll of solicitors of the High Court of Chancery, and off the roll of any of Her Majesty's Courts of Record at Westminster on which his name may be.

XXI. *Chief Clerks to hold office during good behaviour.*—Every such Chief Clerk shall hold his office during his good behaviour, and so long as he shall personally give his attendance upon his duties, and shall conduct himself honestly and faithfully in the execution of the duties of his office, but subject to the power hereinafter contained to remove any Chief Clerk for any cause which the Lord Chancellor and judges removing may think sufficient.

XXII. *And clerks during pleasure.*—Every such junior clerk shall hold his office at the pleasure of the judge in whose court he shall be attached.

XXIII. *Chief and junior clerks to be under control and direction of judges.*—Such Chief Clerks and junior clerks shall be respectively under the control of the judge to whose court they shall respectively be attached, and shall attend at such places, during such time, and for such hours in each day, and perform such duties, as such judge shall from time to time direct.

XXIV. *Chief and junior clerks subject to same penalties, &c., as imposed, &c., under act 3 & 4 Will. 4, c. 94, as respects officers of the Court of Chancery.*—Every Chief Clerk and every junior clerk to be appointed under this act shall be subject and liable to such and the same prohibitions, prosecutions, penalties, and punishments, as are by an act passed in the session holden in the third and fourth years of the reign of King William the Fourth, chapter ninety-four, imposed and directed with respect to persons holding any office, situation, or employment in the said Court of Chancery, or under any of the judges or officers thereof, in the same manner as if the enactments therein contained relating to such officers of the said court respectively were here repeated.

XXV. *Power to Lord Chancellor, with concurrence of judges, to remove Chief Clerks.*—It shall be lawful for the Lord Chancellor, with the concurrence of the Master of the Rolls and Vice-Chancellors for the time being, or any two of them, by any order to remove any Chief Clerk to be appointed under this act from his office, without stating any cause for such removal.

XXVI. *Business to be disposed of in chambers by the judges.*—The business to be disposed of by the Master of the Rolls and Vice-Chancellors respectively while sitting at chambers shall consist of such of the following matters as the judge shall from time to time think may be more conveniently disposed of in chambers than in open court; *videlicet*, applications for time to plead, answer, or demur; for leave to amend bills or claims; for enlarging publication; and also applications for the production of documents; applications relating to the conduct of suits or matters; applications as to the guardianship and maintenance of infants; matters connected with the management of property; and such other matters as each such judge may from time to time see fit, or as may from time to time be directed by any General Order of the Lord Chancellor.

The 26th section cannot be read disjunctively, and therefore, when a defendant has been required to answer, and has not answered, the plaintiff's bill, and the time for putting in such answer has expired, the old practice of filing a traversing note must be adopted: (*Heath v. Lewis*, 17 Jur. 1090.)

Under these statutes, one Vice-Chancellor has jurisdiction to hear a petition for another Vice-Chancellor: (*Holloway v. Phillips*, 17 Jur. 875.)

A plaintiff having given notice of motion for decree, may obtain an order of course to amend his bill after the defendant has filed affidavits in opposition to the motion for decree: (*Gill v. Kayner*, 1 Kay & S. 395.)

An order of course may be obtained, after replication, to amend by adding parties, where no new issue is tendered thereby: (*Bryan v. Austell*, Kay, App. 47.)

A judge in chambers is not authorized under this section, to entertain applications with reference to funds paid into court under the acts for relief of trustees: such applications must originate in and be founded upon a petition presented to the court: (*Re Hodge*, 4 De Gex, Macn. & Gord. 491.)

XXVII. *Judges may adjourn from open court to chambers, and vice versa, the consideration of any matter.*—It shall be lawful for the Master of the Rolls and every of the Vice-Chancellors respectively when sitting in open court to adjourn for consideration in chambers any matter which, in the opinion of such judge, may be more conveniently disposed of in chambers, or, when sitting in chambers, to direct any matter to be heard in open court which he may think ought to be so heard.

XXVIII. *Mode of proceeding before judges at chambers to be by summons as at common law.*—The mode of proceeding before the Master of the Rolls and Vice-Chancellors respectively at chambers shall be by summons, and as near as may be according to the form now adopted by the judges of the Superior Courts of Common Law when sitting at chambers.

XXIX. *Power to the judges to direct what matters, &c., shall be heard and investigated by themselves, and what by their Chief Clerks—Right to suitor to bring any point before the judge.*—From and after the first day of Michaelmas Term one thousand eight hundred and fifty-two the Master of the Rolls and the Vice-Chancellors respectively shall have the sole power (subject to any rules which may be made by the Lord Chancellor with the advice and assistance of them or any two of them) to order what matters and things shall be investigated by and before their respective Chief Clerks, either with or without their direction, during their progress, and what matters and things shall be heard and investigated by themselves; and particularly, if the judge shall so direct, his Chief Clerks respectively shall take accounts, and make such inquiries as have usually been prosecuted before the Chief Clerks of the present Masters; and the judge shall give such aid and directions in

every or any such account or inquiry as he may think proper, but subject nevertheless to the right hereinafter provided for the suitor to bring any particular point before the judge himself.

XXX. *Power to Chief Clerks to issue advertisements and summonses, to administer oaths, &c., as the judge shall direct.*—Each Chief Clerk shall, for the purpose of any proceedings directed by the Master of the Rolls or any Vice-Chancellor to be taken before him, have full power to issue advertisements, to summon parties and witnesses, to administer oaths, to take affidavits and acknowledgments, other than acknowledgments by married women, to receive affirmations, and, when so directed by the judge to whose court he is attached, to examine parties and witnesses either upon interrogatories or *viva voce*, as such judge shall direct.

XXXI. *Parties, &c., not attending liable to process of contempt and to penalties for false swearing, &c.*—Parties and witnesses so summoned shall be bound to attend in pursuance of any such summons, and shall be liable to process of contempt, in like manner as parties or witnesses are now liable thereto in case of disobedience to any order of the said court, or in case of default in attendance, in pursuance of any order of the said court, or of any writ of *subpœna ad testificandum*; and all persons swearing or affirming before any such Chief Clerk shall be liable to all such penalties, punishments, and consequences for any wilful and corrupt false swearing or affirming contained therein as if the matters sworn or affirmed had been sworn and affirmed before any person now by law authorized to administer oaths, to take affidavits, and to receive affirmations.

XXXII. *Result of proceedings before Chief Clerk to be embodied in form of short certificate, &c.*—The directions to be given by the Master of the Rolls or any Vice-Chancellor for or touching any proceedings before his Chief Clerk shall require no particular form, but the result of such proceedings shall be stated in the shape of a short certificate to the judge, and shall not be embodied in a formal report, unless in any case the judge shall see fit so to direct; and when the judge shall approve of such certificate or report he shall sign the same in testimony of his adopting the same.

XXXIII. *No exceptions to lie to certificate, &c.—Parties at liberty to take opinion of judge upon any particular point.*—No exceptions shall lie to any certificate or report of the Chief Clerk, although signed and adopted by the judge; but any party shall, either during the proceedings before such Chief Clerk, or within such time after such proceedings shall have been concluded, and before the certificate or report shall have been signed and adopted, as the Lord Chancellor shall by any general order direct, be at liberty to take the opinion of the judge upon any particular point or matter arising in the course of the proceedings, or upon the result of the whole proceeding when it is brought by the Chief Clerk to a conclusion.

XXXIV. *Certificate, &c., signed and adopted by judge, binding on all parties unless discharged or varied.*—When any certificate or report of the chief clerk shall have been signed and adopted by the judge the same shall be filed in like manner as reports are now filed, and shall

thenceforth be binding on all the parties to the proceedings, unless discharged or varied, either at chambers or in open court, according to the nature of the case, upon application by summons or motion within such time as shall be prescribed in that behalf by any General Order of the Lord Chancellor; and nothing herein contained shall prejudice or affect the power of the court at any time to open any such certificate or report upon the same or the like grounds as any report of the Master of the said court which has been absolutely confirmed may now be opened.

After a certificate of purchase, under a sale by the court, has become binding by the lapse of eight days since the signature by the judge, the purchaser is considered to be so far the absolute owner, that he may sell at an advanced price for his own benefit: (1 Kay & John. 324.)

XXXV. *Sections 13, 14, and 15 of 3 & 4 Will. 4, c. 94, repealed.*—From and after the first day of Michaelmas Term one thousand eight hundred and fifty-two, the thirteenth, fourteenth, and fifteenth sections of the act passed in the session of Parliament holden in the third and fourth years of the reign of His Majesty King William the Fourth, chapter ninety-four, shall be repealed.

XXXVI. *All powers possessed by Masters to be exercised by judges.*—From and after the first day of Michaelmas Term one thousand eight hundred and fifty-two, all or any of the powers, authorities, and jurisdiction given to the Masters in Ordinary of the said court by any act or acts then in force may be exercised by the Master of the Rolls and Vice-Chancellors respectively.

XXXVII. *Power to judges to exercise the powers given by sections 7, 8, and 9 of this act, and to dispose of any cause, &c., in open court.*—From and after the first day of Michaelmas Term one thousand eight hundred and fifty-two the powers given to the Masters in Ordinary of the said court, and to the court by sections seven, eight, and nine of this act, may be exercised by the Master of the Rolls and Vice-Chancellors respectively with respect to causes, matters, and things which may be depending before them respectively in chambers; and if and when any such judge shall be of opinion that any cause, matter, or thing so depending ought to be finally disposed of, unless the parties or some of them can show good cause to the contrary, he shall direct the same to stand in his paper in open court, giving such notice thereof, if any, as he shall deem right, and proceed to dispose thereof accordingly.

XXXVIII. *Power to Lord Chancellor, with advice, &c. of judges to make rules and orders for regulating the mode of procedure at chambers, payment of fees, &c.*—It shall be lawful for the Lord Chancellor, with the advice and consent of the Master of the Rolls and Vice-Chancellors, or any two of them, and they are hereby required, forthwith to make and issue General Rules and Orders for regulating the times and form and mode of procedure before the Master of the Rolls and Vice-Chancellors respectively, sitting at chambers, and their respective Chief Clerks, and generally the practice of the said court in respect of the matters to which this act relates, and for regulating the fees and allowances to

solicitors of the said court in respect to such matters, and also for regulating the fees to be payable by suitors of the said court to the officers thereof in respect of the business to be conducted before the Master of the Rolls and Vice-Chancellors respectively sitting at chambers, and their respective Chief Clerks; and such rules and regulations may from time to time be rescinded, altered, varied, or added to by the like authority; and all such rules and regulations as aforesaid shall take effect as General Orders of the said court: provided always, that no greater amount of fees shall be payable by the suitors of the said court to the officers thereof, in respect of the business to be conducted before the Master of the Rolls and the Vice-Chancellors respectively sitting at chambers, and their respective Chief Clerks, than is now levied in respect of similar or analogous business in the Masters' offices.

XXXIX. *Business in Masters' offices to be conducted in the same manner as similar business is conducted by judges, &c.*—From and after the said first day of Michaelmas Term one thousand eight hundred and fifty-two the course of practice and proceeding in the offices of the Masters in Ordinary of the said court, so far as the same may be inconsistent with the rules and regulations to be so as aforesaid made by the Lord Chancellor with such advice and consent as aforesaid, shall be abolished; and the Masters in Ordinary of the said court shall, with reference to the proceedings before them, adopt all such rules and regulations, and shall conduct the business of their respective offices, as nearly as may be, in the manner in which similar business shall be conducted by the Master of the Rolls and Vice-Chancellors respectively, save only that the Master, instead of communicating directly with the judge, is to report shortly the result of his inquiries to the court.

XL. *Power to judges at chambers to take opinion of conveyancing counsel in certain matters—Parties may object to such opinion, which may be disposed of in chambers or open court.*—From and after the first day of Michaelmas Term one thousand eight hundred and fifty-two it shall be lawful for the court or for any judge thereof when sitting at chambers to receive and act upon the opinion of conveyancing counsel in actual practice, to be nominated as hereinafter mentioned, in all cases in which, according to the present practice of the court and of the Master's office, it has been usual for the Master to require or receive the opinion of conveyancing counsel for his aid and assistance in the investigation of the title to an estate, with a view to an investment of money in the purchase or on mortgage thereof, or with a view to a sale thereof, or in the settlement of a draft of a conveyance, mortgage, settlement, or other instrument, or otherwise, and in such other cases as the Lord Chancellor shall by any General Order direct; but it shall be competent for any party to object to any opinion of any such counsel when he shall deem it open to objection, and thereupon the point in dispute shall be disposed of by the court, or by the judge sitting in chambers, according to the nature of the case.

No special or substantive order will be made in ordinary cases for a reference to conveyancing counsel, under this section, but the court will adjourn the case, in order that

the opinion of counsel may be taken in the mean time: (form of order under such a reference, *Harvey v. Brooke*, 17 Jur. 1.)

Under this act the court cannot act on the opinion of the conveyancing counsel in the case of an exchange: (*Thornhill v. Thornhill*, 17 Jur. 252.)

XLI. Power to Lord Chancellor to nominate not less than six conveyancing counsel of ten years practice, &c.—It shall be lawful for the Lord Chancellor to nominate any number of conveyancing counsel in actual practice, not less than six, who shall have practised as such for ten years at least, to be the conveyancing counsel upon whose opinion the court, or any judge thereof, may act in any of the cases last before mentioned, and to supply vacancies in such list from time to time, and to distribute the business among such counsel in such order and manner as to the Lord Chancellor shall seem fit.

XLII. Power to obtain the assistance of accountants, merchants, &c.—It shall be lawful for the said court, or any judge thereof, in such way as they may think fit, to obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, the better to enable such court or judge to determine any matter at issue in any cause or proceeding, and to act upon the certificate of such persons.

The 42nd section of the Masters' Abolition Act, 15 & 16 Vict. c. 80, does not authorize the court to delegate to the Master the power of calling in scientific aid. But where, before the act, a complicated claim for a debt requiring such aid had been referred to the Master, and liberty had been given to the claimant to bring an action, and it appeared that such action, if brought, must go to arbitration, the court ordered the matter to be disposed of in chambers, where the judge would call in such scientific aid as he should think fit: (*Mildmay v. Lord Methuen*, 1 Drew. 216.)

XLIII. Taxing Master to regulate fees to conveyancing counsel, &c., subject to appeal.—The allowances in respect of fees to such conveyancing counsel, accountants, merchants, engineers, actuaries, and other scientific persons shall be regulated by the Taxing Master of the said court, subject to an appeal to the judge to whose court the cause or matter shall be attached, whose decision shall be final.

XLIV. Salary of 1,200*l.* to be paid to each Chief Clerk, and 250*l.* to each junior clerk, with power to the Lord Chancellor from time to time to increase same to 1,500*l.* and 300*l.* respectively.—There shall be paid to every Chief Clerk of the Master of the Rolls and Vice-Chancellors respectively the net yearly salary of one thousand two hundred pounds, and to every junior clerk to be appointed under this act the net yearly salary of two hundred and fifty pounds; and it shall be lawful for the Lord Chancellor from time to time by any order to direct that the salary of any such Chief Clerk as aforesaid may be increased from

time to time until the same shall amount to the net yearly sum of one thousand five hundred pounds, and to direct that the salary of such junior clerk may be increased to the net yearly sum of three hundred pounds: provided always, that no such increase shall be made to any such Chief Clerk until he shall have been in office for three years nor to such junior clerk until he shall have been in office five years, nor in either case without a certificate from the judge to whose court such Chief Clerk or junior clerk shall be attached, that he has conducted himself in such office to the entire satisfaction of such judge: provided also, that the salary to such Chief Clerk shall not be increased at any one period by any greater amount than the sum of one hundred pounds.

The 44th section of the act does not apply to paying money out of court: (*Rawlins M-Mahon*, 1 Drew. 728.)

XLV. Pensions to Chief and junior Clerks in cases of permanent infirmity.—It shall be lawful for the Lord Chancellor, with the consent of the Commissioners of Her Majesty's Treasury, by any order made on a petition presented to him for that purpose, to order (if he shall think fit) to be paid to any person executing the office of Chief Clerk or junior clerk to the Master of the Rolls or any of the Vice-Chancellors, who shall be afflicted with some permanent infirmity disabling him from the due execution of his office, and shall be desirous of resigning the same, an annuity not exceeding two-third parts of the yearly salary which such person shall be entitled to at the time of presenting such petition, to be paid and payable at the same time and out of the same funds as compensations under this act are directed to be paid.

XLVI. On retirement of Masters, their Chief Clerks to be entitled to retiring pensions of same amount as salary.—It shall be lawful for every person who on the first day of Hilary Term one thousand eight hundred and fifty-two held the office of Chief Clerk to any of the Masters in Ordinary of the said Court of Chancery, and who is not hereby appointed a Chief Clerk to the Master of the Rolls or to one of the Vice-Chancellors under the authority of this act, upon the Master to whom he shall be such Chief Clerk being released from the duties as such Master under the authority of this act, or upon the death or resignation of any such Master previously to his being so released, to continue to be entitled to receive during his life, by way of retiring pension, the full amount of his salary as such Chief Clerk, such salary to be paid and payable out of such funds and in such manner as herein-after in that behalf directed.

XLVII. Compensation to junior clerks on retirement of Masters.—It shall be lawful for any person who on the said first day of Hilary Term one thousand eight hundred and fifty-two, held the office of junior clerk to any Master in Ordinary of the said Court of Chancery hereby released, or who shall be released by the Lord Chancellor under the authority of this act, to make a claim for compensation to the Commissioners of Her Majesty's Treasury for the time being, at any time after the Master in whose office he shall have been employed shall have been released; and such commissioners are hereby required, within the space of six calendar months after every such claim shall be made, by ex-

amination upon oath or otherwise, which oath they and every of them are and is hereby authorized to administer, to inquire whether any, and, if any, what compensation ought to be made to such person claiming such compensation; and in all cases in which it shall appear to the said commissioners that compensation ought to be granted, it shall be lawful for the said commissioners, by warrant under their hands, to order and direct that such annual compensation shall be made to the persons claiming such compensations as aforesaid, or any of them, as to the said commissioners in their discretion shall seem just and reasonable; and all such compensations shall be paid and payable out of such funds and in such manner as hereinafter in that behalf directed: provided always, that an account of all such compensations shall, within fourteen days next after the same shall be so granted, be laid on the table of the House of Commons, if Parliament shall be then assembled, or if Parliament shall not be then assembled, then within fourteen days after the meeting of the Parliament then next following.

XLVIII. Salaries, &c., to be paid quarterly out of the Suitors' Fee Fund Account.—Except as herein otherwise provided, all salaries under this act shall grow due from day to day, but shall be payable, under an order of the Lord Chancellor, on the third day of February, the third day of May, the third day of August, and the third day of November in every year, or on such other days as the Lord Chancellor shall from time to time by any order direct, and shall be paid to the parties entitled thereto, or their respective executors or administrators, out of the fund standing in the name of the Accountant-General of the Court of Chancery, to the account intituled "The Suitors' Fee Fund Account," but subject and without prejudice to the payment of all salaries and other sums of money by any former act or acts now in force directed or authorized to be paid thereof.

XLIX. Payment of compensations to be made quarterly out of Parliamentary securities.—Except as herein otherwise provided, all compensations under this act shall grow due from day to day, but shall be payable on the third day of February, the third day of May, the third day of August, and the third day of November in every year, or on such other days as the Lord Chancellor shall from time to time by any order direct, and shall be paid to the parties entitled thereto, or their respective executors or administrators, out of the interest and dividends of the Government or Parliamentary securities now or hereafter to be placed in the name of the Accountant-General of the Court of Chancery to the two accounts intituled "Account of Moneys placed out for the Benefit and better Security of the Suitors of the High Court of Chancery," and "Account of Sureties purchased with surplus interest arising from Securities carried to an Account of Moneys placed out for the Benefit and better Security of the Suitors of the Court of Chancery," or either of them, by the Governor and Company of the Bank of England, by virtue of any order or orders of the Lord Chancellor to be made from time to time for that purpose, without any draft from the Accountant-General, but subject and without prejudice to the payment of all salaries and other sums of money by any former act or acts now in force directed or authorized to be paid thereout.

L. On appointment of Masters or clerks to office or employment under the Crown, the retiring pension or compensation under this act to be regulated by the salary, &c., of such office or employment.—If at any time hereafter any of the Masters in Ordinary of the said court or any of their chief or junior clerks, shall be appointed to and shall accept any office or employment connected with any Court of Law or Equity, or under the Crown, or in any public department under the Crown, and if the salary attached to such office or employment, or any retiring pension or allowance in respect thereof, shall equal or exceed in amount the retiring pension or compensation payable to such Master or such clerk under this act, such last-mentioned retiring pension or compensation shall, during the continuance of such Master or such clerk in such office or employment, or so long as he shall be in the receipt of any retiring pension or allowance in respect thereof equal to or greater than his retiring pension or compensation under this act, cease to be payable to such Master or such clerk, as the case may be; and if the salary attached to such office, or the retiring pension or allowance in respect thereof shall be less than the amount of such Master's retiring pension or such clerk's compensation under this act, such retiring pension or such clerk's compensation under this act, shall be reduced by the amount of such salary or of such retiring pension or allowance as the case may be.

LI. Appropriation of the Masters' offices in Southampton-buildings.—Such of the Masters' offices in Southampton-buildings, Chancery-lane, as shall not be assigned by the Lord Chancellor as chambers for the Master of the Rolls and Vice Chancellors respectively, or shall not be required for the Masters, shall be appropriated to any other purposes connected with the Court of Chancery as the Lord Chancellor may from time to time direct, or the same may be let as chambers, and the rent thereof paid to the Suitors' Fund; and when all the Masters have resigned, died, or have been released under this act, the offices may be sold by order of the Lord Chancellor, and the proceeds of such sale paid to the Suitors' Fund, in such manner and to such particular account as the Lord Chancellor shall by any order direct; and it shall be lawful for the Lord Chancellor by any order to direct that the premises so to be sold, and the fee simple and inheritance thereof, shall vest in the purchaser or purchasers of the same, his or their heirs and assigns, or as he or they shall direct; and such order shall have the effect of vesting the same accordingly, without any conveyance or other assurance from Her Majesty, in whom the same are now vested by virtue of an act passed in the thirty-second year of the reign of King George the Third, chapter forty two.

LII. Power to Her Majesty to appoint a Vice-Chancellor as successor to Sir G. J. Turner.—And whereas by an act passed in the fifth year of the reign of her present Majesty, session one, chapter five, Her Majesty was by section nineteen empowered to appoint, by letters patent under the Great Seal, two fit persons to be additional judges assistant to the Lord Chancellor in the discharge of the judicial functions of his office, each of such additional judges to be called Vice-Chancellors; and by section twenty-one it was provided, that nothing therein contained

should authorize the appointment of a successor to the Vice-Chancellor secondly appointed under the authority of the said act: and whereas by an act passed in the session holden in the fourteenth and fifteenth years of the reign of her present Majesty, chapter four, Her Majesty was by section one empowered to appoint, by letters patent under the Great Seal, a fit person to be an additional judge assistant to the Lord Chancellor, in discharge of the judicial functions of his office, in the place of the Right Honourable Sir James Wigram, Knight, who was the Vice-Chancellor secondly appointed under the authority of the said act of the fifth year of Her Majesty, and who had resigned the office of Vice-Chancellor to which he had been so appointed: and whereas the Right Honourable Sir George James Turner, Knight, is the Vice-Chancellor appointed under the said last-mentioned act: and whereas by section nine of the same act it was provided, that nothing therein contained should authorize the appointment of a successor to the Vice-Chancellor appointed under the authority thereof: and whereas by virtue of this act additional duties will devolve upon the judges of the said court, and it is expedient that any vacancy which may occur in the said office, of Vice-Chancellor should be supplied: be it therefore enacted, that it shall be lawful for Her Majesty, from time to time when and as any vacancy shall occur in the office of Vice-Chancellor now held by the said Sir George James Turner, by the death, resignation, or removal from office of the said Sir George James Turner, or his successor for the time being, it shall be lawful for Her Majesty, by letters patent under the Great Seal of the United Kingdom, to appoint a fit person, being or having been a barrister of fifteen years standing at the least, to supply such vacancy.

LIII. *Such Vice-Chancellor to have same power, &c., as Sir G. J. Turner has.*—The Vice-Chancellor to be appointed under this act shall have all the same powers and privileges, and the same rank, and shall be subject to the same provisions, duties and observances, as the said Sir George James Turner shall, at or immediately before his death, resignation, or removal from office, have or be subject to under the said act of the fourteenth and fifteenth years of her present Majesty, chapter four, and this act, or any other act or acts then in force, excepting that, as between himself and the other Vice-Chancellors or Vice-Chancellor for the time being, he shall have rank and precedence next after the Vice-Chancellors or Vice-Chancellor, if any, who may be senior to him in appointment to office.

LIV. *Officers and attendants to Vice-Chancellor.*—Such Vice-Chancellor shall have a secretary, usher, and trainbearer, to be from time to time appointed and removed by him at his pleasure; and the secretaries, registrars, and other officers appointed to attend the Lord Chancellor shall attend such Vice-Chancellor when sitting for the Lord Chancellor, and also when sitting in his separate court or in chambers, as circumstances shall require, and as the Lord Chancellor shall order and direct.

LV. *Salaries of Vice-Chancellor and his officers to be as at present.*—The salary of such Vice-Chancellor, and the salaries of his secretary, usher, and trainbearer, shall be of the same amounts, and paid out of

the same funds, and in like manner, as the salaries of the said Sir George James Turner his secretary, usher, and trainbearer, respectively, shall be payable at or immediately before his death, resignation, or removal from office.

LVI. *Her Majesty may grant retiring pension to Vice-Chancellor so appointed.*—It shall be lawful for Her Majesty, by letters patent under the Great Seal of the United Kingdom, to grant to any person executing the office of Vice-Chancellor in pursuance of this act, on his resignation of or his ceasing to execute his office, an annuity of the same amount, after the same period of service, under the same circumstances, subject to the same conditions, and payable out of the same fund, as the annuity authorized to be granted to each of the Vice-Chancellors appointed under the said act of the fifth year of Her Majesty, chapter five.

LVII. *Lord Chancellor may appoint court-keepers.*—It shall be lawful for the Lord Chancellor to appoint one or more person or persons, removable at pleasure, for the purpose of keeping order in the court of the Vice-Chancellor to be appointed under this act; and the salary of the person or persons appointed or to be appointed, under this act or under any act or acts now in force, to keep order in the court of the Vice-Chancellor to be appointed under the authority of this act, shall be of such amount, not exceeding the yearly sum of eighty pounds, as the Lord Chancellor may think reasonable; and such salary shall be paid to each such person so to be appointed, out of the same funds, and at the same time, and in like manner as the salaries of like persons have heretofore been paid.

LVIII. *Rights and establishments of the present Masters to continue until released in pursuance of this act.*—Nothing herein contained shall in anywise prejudice or affect the title of the present Masters in Ordinary of the said court to the salaries payable to them as such masters unless and until they shall be respectively released under this act, or the power of the Lord Chancellor to order a retiring allowance to any of them or any of their clerks who may be or become afflicted with some permanent infirmity disabling him from the due execution of his office, and who shall be desirous of resigning the same; and every of the present Masters in Ordinary of the said court, until released under this act, shall have the same establishment of clerks, whose salaries and compensations shall be payable out of the same funds as the salaries and compensations of their clerks are now payable; and all the expenses attending the establishment of the Masters offices shall be paid in like manner as such expenses are now paid.

LIX. *Nothing to affect the rights &c., of Accountant-General as a Master in Ordinary.*—Nothing herein contained shall prejudice or affect the rights, duties, or privileges of the Accountant-General of the said Court of Chancery as a Master in Ordinary of the said court, or any salary or other payment payable to the said Accountant-General as such Master in Ordinary, or his right or title to any retiring allowance under any act or acts of Parliament now in force, nor shall the said Accountant-General be called upon or required to do or perform any duties or services as such Master in Ordinary, other than such as are now usually performed by him.

LX. *The retiring Lord Chancellor may deliver written judgments within six weeks after his resignation.*—Whereas it has frequently happened that after cases have been fully heard by the Lord Chancellor in the Court of Chancery and are standing for judgment, the Lord Chancellor has delivered up the Great Seal without being able by reason of other urgent public business, to deliver judgment therein, and much inconvenience and expense to the parties has been thereby occasioned:

For remedy thereof be it enacted, that in every such case it shall be lawful for the person who has so delivered up the Great Seal, within six weeks after he shall have delivered up the same, to give in to the Registrar of the said court a written judgment therein, signed by him; and a decree or order, as the case may require, shall be drawn up in pursuance of such judgment; and every such decree or order shall have the same force and effect as if the judgment in pursuance whereof it is drawn up had been given in open court the day before he shall have so delivered up the Great Seal.

LXI. *Construction of terms.*—In the construction of this act the expression “Her Majesty,” shall mean the sovereign for the time being, and the expression “Lord Chancellor,” shall mean also and include the Lord Chancellor, Lord Keeper and Lord Commissioners for the custody of the Great Seal of the United Kingdom for the time being.

When an order is made by a judge in chambers on the hearing of the application, it seems the appeal should be direct from that order, and it is neither necessary nor proper that it should be re-heard even *pro formâ*, by the judge who made it: (*Saunders v. Druce*, 3 Drew. 139.)

On an adjourned hearing from chambers, the court will not make any declaration, but, if necessary, will direct a certificate to the same effect, to be drawn up for its approval: (*Morgan v. Hutchett*, 19 Beav. 86.)

Where a deed is to be settled by the court, it is sent to the judge's chambers, and from the Judge's chambers it is sent to the conveyancing counsel. When a matter deserves the arguments of counsel, it is to be argued in court: (*Re Bennett's estate*, 18 Jur. 33.)

The chief clerk in chambers never makes any order of his own authority, but all orders in chambers are orders of the judge, and are in fact made by him in the presence of the parties, unless they agree for their own convenience, to take the orders without actually going before the judge in chambers, or unless the order is such an order of course as would be made in court, without communication with the judge, upon simply handing a brief to the registrar. Such last-mentioned order, when made in chambers, being made upon communication of the chief clerk to the registrar, without the actual intervention of the judge: (Kay, App. 31.)

GENERAL ORDERS AND RULES OF THE HIGH COURT OF CHANCERY, ISSUED BY THE LORD CHANCELLOR, SEVENTH DAY OF AUGUST, 1852.

Order of Court, Saturday, the 7th day of August, 1852.

THE Right Hon. Edward Burtenshaw, Lord St. Leonards, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Hon. Sir John Romilly, Master of the Rolls; the Right Hon. the Lord Justice Sir James Lewis Knight Bruce, the Right Hon. the Lord Justice Lord Cranworth, the Right Hon. the Vice-Chancellor Sir George James Turner, the Hon. the Vice-Chancellor Sir James Parker, doth hereby, in pursuance of an act passed in the fifteenth and sixteenth years of her present Majesty, intituled, "An Act to amend the practice and course of proceeding in the High Court of Chancery," and in pursuance and execution of all other powers enabling him in that behalf, order and direct:—

That all and every the orders, rules, and directions hereinafter set forth, shall henceforth be, and for all purposes be deemed and taken to be "General Orders and Rules of the High Court of Chancery," viz.:—

Printing.

1. Bills and claims are to be printed on writing royal paper, quarto, in pica type, leaded; and the copy to be filed is to be interleaved with paper of the same description.

2. No costs are to be allowed, either as between party and party, or as between solicitor and client, for any written bill or written copy of a bill, filed under the 15th and 16th Vict. c. 86, s. 6, or for any written copy thereof, served upon the defendant thereto, or for any written brief of such bill, unless the court shall, in disposing of the costs of the cause, direct the allowance thereof.

3. The Clerks of Records and Writs shall, at the expiration of fourteen days from the filing of any written bill or written copy of a bill, take off the files of the court, without further order, the bill or copy so filed, unless a printed copy thereof shall in the meantime have been filed, and the plaintiff in the suit, or his solicitor, who shall personally have undertaken to file such printed copy, shall pay to the defendant all the costs incurred by him in the suit, such costs to be taxed by the Taxing Master, without further order, upon production to him of the certificate of the Clerk of Records and Writs, that a printed copy of the bill has not been filed pursuant to such undertaking, and to be recoverable in like manner as costs ordered to be paid by a party in a suit to another party in a suit are now recoverable.

4. In lieu of the fees now payable to solicitors for instructions for bills, for engrossing bills and claims, for copies of bills and claims, for abbreviating bills and making a brief thereof, solicitors shall be entitled to charge, and be allowed in suits commenced after these orders come into operation, the fees specified in Schedule A., to these orders.

5. The payment to be made by the defendant to the plaintiff for printed copies of the bill or claim shall be at the rate of one halfpenny per folio.

6. No defendant shall be at liberty to demand from the plaintiff more than ten printed copies of his bill or claim.

Amendment of Bills and Claims.

7. Where, according to the present practice of the court, an amendment of a bill or claim may be made without a new engrossment thereof, a bill or claim may be amended by written alterations in the printed bill of complaint or claim so to be filed, and by additions on the paper to be interleaved therewith, according to the directions of the order.

8. The practice of amending a defendant's copy of the bill shall, with respect to the amendment of bills filed after these orders come into operation, be abolished.

9. A copy of an amended bill or claim, whether upon an amendment by a reprint, or by such alterations and additions as mentioned in Order 7, is to be served upon the defendant or his solicitor, and such copy may be partly printed and partly written, if the amendment is not made by a reprint: but in every case the copy to be served is to be stamped with the proper stamp by one of the Clerks of Records and Writs, indicating the filing of such amended bill or claim, and the date of the filing thereof.

10. In all cases where, according to the present practice of the court, a subpoena to appear to and to answer an amended bill may be served upon the solicitor of a defendant, service upon the defendant's solicitor of a copy of an amended bill, whether wholly printed or partly printed and partly written, shall be good service on the defendant.

11. Where a defendant has appeared in person to any bill, service at the address for service of such defendant of a copy of an amended bill, whether wholly printed or partly printed and partly written, shall be good service on the defendant.

Limitation of preceding Orders.

12. None of the preceding orders shall apply to bills or claims filed before these orders come into operation, though afterwards amended; and the existing practice of the court is to continue in force with reference to the amendment of such bills and claims.

13. The existing practice of the court with reference to issuing and serving writs of subpoena to appear and answer bills and writs of summons on claims, are also to continue in force with respect to bills and claims filed before these orders come into operation.

Mode in which the directions of the court are obtained on the question of what parties are to be served with the order or decree, and as to which of the parties service may be dispensed with : (*De Balinhard v. Bullock*, 9 Hare, App. 13.)

Form of Bill.

14. Bills may be in a form similar to the form set out in Schedule B. to these orders, with such variations as the nature and circumstances of each particular case may require.

Interrogatories.

15. The interrogatories for the examination of the defendant to a bill may be in a form similar to the form set out in Schedule C. to these orders, with such variations as the nature and circumstances of each particular case may require.

16. In cases in which the plaintiff requires an answer to any bill from any defendant or defendants thereto, the interrogatories for the examination of such defendant or defendants are to be filed within eight days after the time limited for the appearance of such defendant or defendants.

17. If the defendant appear in person, or by his own solicitor, within the time limited for that purpose by the rules of the court, the plaintiff is, within eight days after the time allowed for such appearance, to deliver to the defendant or defendants so required to answer, or to his or their solicitor or solicitors, a copy of the interrogatories so filed as aforesaid, or such of them as the particular defendant or defendants shall be required to answer. And the copy so to be delivered is to be examined with the original, and the number of folios counted by the Clerk of Records and Writs, who, on finding that such copy is duly stamped and properly written, are to mark same as an office copy.

18. If any defendant to a suit commenced by bill do not appear in person, or by his own solicitor, within the time allowed for that purpose by the rules of the court, and the plaintiff has filed interrogatories for his examination, the plaintiff may deliver a copy of such interrogatories so examined and marked as aforesaid to the defendant, at any time after the time allowed to such defendant to appear, and before his appearance in person, or by his own solicitor; or the plaintiff may deliver a copy of such interrogatories so examined and marked as aforesaid to the defendant or his solicitor, after the appearance of such defendant in person, or by his own solicitor, but within eight days after such appearance.

19. A defendant required to answer a bill must put in his plea, answer, or demurrer thereto, not demurring alone, within fourteen days from the delivery to him, or his solicitor, of a copy of the interrogatories which he is required to answer; but the court shall have full power to enlarge the time from time to time, upon application being made to the court for that purpose.

Form of Answer.

21. Answers may be in a form similar to the form set out in Schedule D. to these orders, with such variations as the nature and circumstances of each particular case may require.

Motion for Decree.

22. One month's notice is to be given by the plaintiff to the defendant or defendants, of the motion for a decree or a decretal order.

23. The affidavits to be used in support of such motion are to be filed before the service of such motion, and a list of such affidavits is to be set forth at the foot of such notice.

On a motion for a decree the answer of a defendant may be read against himself without notice having been given under the 23rd Order of August, 1852, of the intention to read the same as an affidavit against such defendant; but the answer of one defendant cannot be read against another defendant without notice being given to such other defendant of the intention to read it; and *semble*, a deed mentioned in the answer of a defendant is admissible in evidence on a motion for a decree against him, without notice of the intention to use it: (*Cousins v. Vasey*, 9 Hare, App. 61.)

The court has jurisdiction under the 15 & 16 Vict. c. 86, to issue *subpœna ad testificandum* or a *subpœna duces tecum*, requiring the attendance of witnesses on a motion for decree: (*Wigan v. Rowland*, 10 Hare, App. 18.)

24. The defendant, within fourteen days after the service of such notice, is to file his affidavits in answer, and to furnish the plaintiff or his solicitor with a list thereof.

25. Within seven days after the expiration of such fourteen days, the plaintiff is to file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and he is to furnish the defendant or his solicitor with a list thereof; and except so far as these affidavits are in reply, they are not to be regarded by the court, unless upon the hearing of the motion the court shall give leave to the defendant to answer them; and in that case the costs of such affidavits, and of the further affidavits consequent upon them, shall be paid by the plaintiffs, unless the court shall otherwise order.

26. No further evidence upon either side is to be used upon such motion for a decree or decretal order, without leave of the court.

27. Every notice of motion for a decree or decretal order is to be entered with the registrar, who is to make out a list of such motions, and the same are to be heard according to such list, unless the court shall make order to the contrary.

28. Where a defendant shall not have been required to answer, and

shall not have answered the plaintiff's bill, so that under the 15 & 16 Vict. c. 86, s. 26, he is to be considered as having traversed the case made by the bill, issue is nevertheless to be joined by filing a replication in the form, or to the effect, of the replication now in use.

Under the 26th section of the 15 & 16 Vict. c. 86, and 28th Order of August, 1852, a replication is necessary when the decretal order has not been made, and the suit is to be proceeded with in the ordinary way; but is not necessary if the plaintiff is proceeding by motion for decree: (*Duffield v. Sturges*, 9 Hare, App. 87.)

Dismissal for want of Prosecution.

29. A defendant to a suit commenced by bill who shall not have been required to answer the bill, and shall not have answered the same, shall be at liberty to apply for an order to dismiss the bill, for want of prosecution, at any time after the expiration of three months from the time of his appearance, unless a motion for a decree or decretal order shall have been set down in the meantime, or the cause shall have been set down to be heard, and the court may, upon such application, if it shall think fit, make an order dismissing the bill, or make such other order, or impose such terms, as may appear just and reasonable.

Impertinence.

30. The application to be made for the costs of any impertinent matter introduced into any bill, answer, or other proceeding, is to be made at the time, when the court disposes of the costs of the cause or matter, and not at any other time.

Evidence.

31. The time within which the plaintiff in any suit commenced by bill, is to give the defendant notice of the mode in which he desires the evidence to be adduced in the cause shall be taken, is to be seven days after issue joined therein, and if the plaintiff shall not within such time give any such notice, or if the plaintiff shall give such notice, and shall therein desire the evidence to be adduced upon affidavit, the plaintiff, and defendant respectively shall be at liberty to verify their respective cases by affidavit, unless the defendant, or some or one of the defendants, if more than one, shall within the fourteen days after the expiration of the said period of seven days, give notice to the plaintiff, or his solicitor, that he or they desire the evidence to be oral.

32. The evidence on both sides in any cause to be used at the hearing thereof, whether taken orally (and including the cross-examination and re-examination of any witness or witnesses), or taken upon affidavit, is to be closed within nine weeks after issue joined therein, except that

any witness who has made an affidavit intended to be used by any party to such cause at the hearing thereof, shall be subject to cross-examination within one month after the expiration of such period of nine weeks.

33. No affidavit filed before issue joined in any cause shall be received or receivable at the hearing thereof unless within one month after issue joined, notice in writing shall be given by the party intending to use the same to the opposite party of his intention in that behalf.

34. Any party desiring to cross-examine a witness who has made an affidavit in any cause intended to be used at the hearing thereof, shall give forty-eight hours' notice to the party on whose behalf such affidavit was filed, or to the party intending to use the same, of the time and place of such intended cross-examination, in order that such party may, if he shall think fit, be present at such cross-examination.

35. The re-examination of any such witness is immediately to follow his cross-examination, and is not to be delayed to a future period.

36. Any party in any cause or matter requiring the attendance of any witness before an examiner, for the purpose of his being examined or cross-examined, with a view to his evidence being used upon any claim, motion, petition, or other proceeding before the court, not being the hearing of a cause, shall give to the opposite party or parties forty-eight hours' notice at least of his intention to examine such witness, and of the time and place of such examination, unless the court shall in any case think fit to dispense with such notice.

37. And where it is desired to cross-examine any party, whether a party to the cause or matter or not, who has made an affidavit to be used, or which shall be used on any claim, motion, petition, or other proceeding before the court, not being the hearing of a cause, the party desiring so to cross-examine such deponent, shall give such notice to the opposite party as is required by Order 34, with reference to the cross-examination of a witness, who has made an affidavit to be used on the hearing of a cause.

38. All the above orders with reference to examination, cross-examination, and re-examination of witnesses shall extend and be applicable to evidence taken in any cause subsequent to the hearing thereof.

39. In suits in which issue shall have been joined, when these orders come into operation, the evidence to be used at the hearing of the cause shall be taken according to the existing practice of the court, unless the parties shall consent or the court shall order that the same shall be taken in the mode prescribed by 15 & 16 Vict. c. 86, and these orders.

In a cause at issue before the Orders of August, 1852, the parties, in July, 1852, agreed to postpone publication till the 2nd November, on the ground that the new practice would then come into operation. The case was one in which it was not clear, but probable, that oral examination might be most effective: Held, that the postponement of publication was not an agreement to adopt the new practice, but in the absence of special reasons to the contrary, there being a

probability of advantage in applying the new practice, it ought, according to the intention of the act, to be applied: (*Howard v. Howard*, 1 Drew. 239.)

Adding to Decree.

40. The time within which a party served with notice of a decree under the section 42 of the above act, may apply to the court to add to the decree, is to be one month after such service.

41. A memorandum of the service upon any person or persons of notice of the decree in any suit under the said section, rule 8, is to be entered in the office of the Clerks of Records and Writs, upon due proof, by affidavit of such service.

42. The summons to be obtained under section 45 of the above act may be in a form similar to the form set forth in Schedule E. to these orders, with such variations as the circumstances of the case may require.

Revivor and Supplement.

43. Any party under no disability, or under the disability of coverture, who may be served with an order to revive any suit, or to carry on the proceedings therein, may apply to the court to discharge such order within twelve days after such service; and any party being under any disability other than coverture, who may be so served, may apply to the court to discharge such order within twelve days after the appointment of a guardian or guardians *ad litem* for such party; and until such period of twelve days shall have expired, such order shall have no force or effect against such last-mentioned party.

New Facts or Circumstances.

44. If the plaintiff, in any case, which is not in such a state as to allow of an amendment being made in the bill, shall desire to state, or put in issue, any facts or circumstances which may have occurred after the institution of the suit, he may state the same, and put the same in issue, by filing in the Record and Writ Clerk's Office a statement either written or printed, to be annexed to the bill, and such proceedings, by way of answer, evidence, and otherwise, are to be had and taken upon the statement so filed, as if the same were embodied in a supplementary bill; provided always that the court may make any order which it shall think fit for accelerating the proceedings thereunder, or proceedings therein, in any manner which may appear just and reasonable.

In an administration suit, it had at the hearing been referred to the Master to ascertain whether the proper parties were before the court. One of the defendants found by the Master to be a proper party, died, and administration to his

estate was taken out, and a statement to that effect filed, under the 44th Order of August, 1852. The plaintiff applied by way of motion, that the administrator, who was one of the solicitors in the cause, might be at the further hearing deemed a defendant. Held, that as under the old practice a supplemental bill would have been filed, a short answer put in, and a decree taken against the administrators, so that was the course to be adopted in the present case: (*Heath v. Chapman*, 17 Jur. 570.)

Injunction.

45. No injunction for the stay of proceedings at law is to be granted as of course for default of appearance, or answer to the bill.

Power of Court.

46. The power of the court to enlarge or abridge the time for doing any act, or taking any proceedings in any cause or matter, upon such, if any, terms as the justice of the case requires, is unaffected by these orders.

Commencement of Orders.

47. These orders shall take effect and come into operation on the second day of November, one thousand eight hundred and fifty-two.

Interpretation.

48. In these orders the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction, viz.:—

1. Words importing the singular number include the plural number, and words importing the plural number include the singular number.
2. Words importing the masculine gender include females.
3. The word "bill" includes "information."
4. The word "party" includes a body politic or corporate.
5. The word "affidavit" includes "affirmation."

ST. LEONARDS, C.

JOHN ROMILLY, M. R.

J. L. KNIGHT BRUCE, L. J.

CRANWORTH, L. J.

G. J. TURNER, V. C.

RICHARD T. KINDERSLEY, V. C.

JAMES PARKER, V. C.

SCHEDULE (A.)

Table of Fees.

	£	s.	d.
For instructions for bill	1	14	0
For making a copy of a bill or claim for the printer, per folio	0	0	4
For correcting the proof sheet per folio	0	0	2
For printer's bill (as paid) deducting any copies paid for by the defendant.....			
For amending each copy of a bill or claim to serve where there is no reprint	0	13	4
Instructions for brief, to be allowed on a replication being filed, or on a motion for a decree on a bill, or in an injunction cause on moving for the injunction; but so that this fee shall be charged once only in the progress of a cause	1	1	0
For amending each brief of a bill or claim where there is no reprint	0	13	4
For perusing and considering the bill on behalf of each defendant, or set of defendants, appearing by the same solicitor	1	1	0

SCHEDULE (B.)

Form of Bill.

In Chancery—

John Lee.....	Plaintiff,
James Styles	}Defendants.
and	
Henry Jones	

Bill of Complaint.

To the Right Honourable Edward Burtenshaw, Baron St. Leonards of Slaugham, in the county of Sussex, Lord High Chancellor of Great Britain.

Humbly complaining, sheweth unto his lordship, John Lee, of Bedford-square, in the county of Middlesex, Esq., the above-named plaintiff, as follows—

1. The defendant, James Styles, being seised in fee simple of a farm called Blackacre, in the parish of A., in the county of B., with the appurtenances, did by an indenture dated the 1st of May, one thousand eight hundred and fifty, and made between the defendant, James Styles, of the one part, and the plaintiff of the other part, grant and convey the said farm, with the appurtenances thereto unto, and to the use of the plaintiff, his heirs, and assigns, subject to a proviso for redemption thereof, in case the defendant James Styles, his heirs, executors, administrators, or assigns, should, on the 1st of May, one thousand eight

hundred and fifty-one, pay to the plaintiff, his executors, administrators, or assigns, the sum of five thousand pounds, with interest thereon, at the rate of five pounds per centum per annum, as by the said indenture will appear.

2. The whole of the said sum of five thousand pounds, together with interest thereon at the rate aforesaid, is now due to the plaintiff.

3. The defendant, Henry Jones, claims to have some charge upon the farm and premises comprised in the said indenture of mortgage of the 1st of May, one thousand eight hundred and fifty, which charge is subsequent to the plaintiff's said mortgage.

4. The plaintiff has frequently applied to the defendants, James Styles and Henry Jones, and required them either to pay the said debt, or else to release the equity of redemption of the premises, but they have refused so to do.

5. The defendants James Styles and Henry Jones, pretend that there are some other mortgages, charges or incumbrances affecting the premises, but they refuse to discover the particulars thereof.

6. There are divers valuable oak, elm, and other timber and timber-like trees growing and standing on the farm and lands comprised in the said indenture of mortgage of the first of May, one thousand eight hundred and fifty, which trees and timber are a material part of the plaintiff's said security, and if the same or any of them are felled and taken away, the said mortgaged premises would be an insufficient security to the plaintiff for money due thereon.

7. The defendant James Styles, who is in possession of the said farm, has marked for felling a large quantity of the said oak and elm trees, and other timber, and he has by handbills, published on the second December instant, announced the same for sale, and he threatens and intends forthwith to cut down and dispose of a considerable quantity of the said trees and timber on the said farm.

Prayer.

The plaintiff prays as follows:—

1. That an account may be taken of what is due for principal and interest on the said mortgage.

2. That the defendants, James Styles and Henry Jones, may be decreed to pay to the plaintiff the amount which shall be so found due, together with his costs of this suit, by a short day to be appointed for that purpose, or, in default thereof, that the defendants James Styles and Henry Jones, and all persons claiming under them, may be absolutely foreclosed of all right and equity of redemption in and to the said mortgaged premises.

3. That the defendant, James Styles, may be restrained by the injunction of this honourable court from felling, cutting, or disposing of any of the timber or timber-like trees now standing or growing in or upon the said farm and premises comprised in the said indenture of mortgage, or any part thereof.

4. That the plaintiff may have such further or other relief as the nature of the case may require.

Names of defendants.

The defendants to this bill of complaint are James Styles, Henry Jones.

Y. Y.

(Name of counsel.)

NOTE.—This bill is filed by Messrs. A. B. and C. D., of Lincoln's Inn, in the county of Middlesex, solicitors for the above-named plaintiff.

SCHEDULE (C.)

Form of Interrogatories.

In Chancery—

John Lee.....	Plaintiff,
James Styles } and Henry Jones }	Defendants.

1. Does not the defendant, Henry Jones, claim to have some charge upon the farm and premises comprised in the indenture of mortgage of the first of May, one thousand eight hundred and fifty, in the plaintiff's bill mentioned?

2. What are the particulars of such charge, if any, the date, nature, and short effect of the security, and what is due thereon?

3. Are there, or is there, any other mortgages or mortgage, charges or charge, incumbrances or incumbrance, in any and what manner affecting the aforesaid premises, or any part thereof?

4. Set forth the particulars of such mortgages or mortgage, charges or charge, incumbrances or incumbrance; the date and short effect of the security; what is now due thereon; and who is or are entitled thereto respectively; and when and by whom, and in what matter, every such mortgage, charge, or incumbrance was created.

The defendant James Styles is required to answer all these interrogatories.

The defendant Henry Jones is required to answer the interrogatories numbered 1 and 2.

Y. Y.

(Name of Counsel.)

SCHEDULE (D.)

Form of Answer.

In Chancery—

John Lee.....	Plaintiff,
James Styles } and Henry Jones }	Defendants.

The answer of James Styles, one of the above-named defendants to the bill of complaint of the above-named plaintiff.

In answer to the bill, I, James Styles, say as follows:—

1. I believe that the defendant, Henry Jones, does claim to have a charge upon the farm and premises comprised in the indenture of mortgage of the 1st of May, one thousand eight hundred and fifty, in the plaintiff's bill mentioned.

2. Such charge was created by an indenture dated the 1st of November, one thousand eight hundred and fifty, made between myself of the one part, and the said defendant, Henry Jones, of the other part, whereby I granted and conveyed the said farm and premises, subject to the mortgage made by the said indenture of the first of May, one thousand eight hundred and fifty, unto the defendant, Henry Jones, for securing the sum of two thousand pounds, and interest, at the rate of five pounds per centum per annum, and the amount due thereon is the said sum of two thousand pounds, with interest thereon, from the date of such mortgage.

3. To the best of my knowledge, remembrance, and belief, there is not any other mortgage, charge, or incumbrance, affecting the before said premises.

M. N.

(Name of Counsel.)

SCHEDULE (E.)

Form of Summons.

In Chancery—

In the matter of the estate of John Thomas, late of the parish of A. in the county of B., deceased.

Joseph Wilson against William Jackson.

Upon the application of Joseph Wilson, of Russell-square, in the county of Middlesex, Esq., who claims to be a creditor upon the estate of the above-named John Thomas, let William Jackson, the executor of the said John Thomas, attend at my chambers [in the Rolls-yard, Chancery-lane, Middlesex], [or at No. square, Lincoln's-inn, Middlesex], on the day of , at of the clock in

the noon, and show cause, if he can, why an order for the administration of the personal estate of the said John Thomas, by the High Court of Chancery, should not be granted.

Dated the day of , 1852.

JOHN ROMILLY, Master of the Rolls, or
G. J. TURNER, Vice Chancellor, or
RICHARD T. KINDERSLEY, Vice-Chancellor, or
JAMES PARKER, Vice-Chancellor.

NOTE.—If the above-named William Jackson does not attend either in person or by his solicitor, at the time and place above mentioned, such order will be made in his absence as the judge may think just and expedient.

This summons was taken out by A. and B. of Lincoln's Inn, in the county of Middlesex, solicitors for the above-named Joseph Wilson.

Order of Court.

The 7th day of August, 1852.

The Right Honourable Edward Burtenshaw, Lord St. Leonards, Lord High Chancellor of Great Britain, by and with the advice and assistance of the Right Honourable Sir John Romilly, Master of the Rolls, the Right Honourable the Lord Justice Sir James Lewis Knight Bruce, the Right Honourable the Lord Justice Lord Cranworth, the Right Honourable the Vice Chancellor Sir George James Turner, the Honourable the Vice-Chancellor Sir Richard Torin Kindersley, and the Honourable the Vice-Chancellor Sir James Parker, doth hereby, in pursuance and execution of all powers enabling him in that behalf, order and direct—

That all and every the orders, rules, and directions hereinafter set forth shall henceforth be, and for all purposes be deemed and taken to be General Orders and Rules of the High Court of Chancery, viz.:

1. That no appeal from any decree, order, or dismissal, or any rehearing of the case on which such decree, order, or dismissal is founded, shall be allowed unless the same is set down for hearing, and the requisite notice thereof duly served, within five years from the date of any such decree, order, or dismissal respectively.

2. That all decrees and orders, and all dismissions pronounced or made in any cause, claim, or matter in this court which shall be enrolled, shall be so enrolled within six calendar months after the same shall be so pronounced or made respectively, and not at any time after without special leave of the court, such leave to be obtained in manner next hereinafter mentioned.

3. In case any party is desirous to enrol a decree, or order, or dismissal, after the expiration of six calendar months from the time the same shall have been made, he shall obtain an order for that purpose, and which order, unless made by consent of the adverse party, or on motion and notice to all the parties, shall be a conditional order in the

first instance, but shall become absolute without further order unless cause is shown against it within twenty-eight days after the service of the order.

4. That where a caveat is entered with the proper officer to stay the signing of the docket of the enrolment of any decree, order, or dismissal, such caveat shall be prosecuted with effect within twenty-eight days after the docket of such decree, order, or dismissal shall be left to be signed with the proper officer by the party who entered the same, otherwise such caveat shall be of no force; and the docket of such decree, order, or dismissal may, immediately after the expiration of the said twenty-eight days, be presented to be signed as if no such caveat had been entered.

5. That no enrolment of any decree, order or dismissal shall be allowed after the expiration of five years from the date thereof.

6. That the Lord Chancellor, either sitting alone, or with the Lords Justices, or either of them, shall be at liberty, where it shall appear to him, under the peculiar circumstances of the case to be just and expedient, to enlarge the periods hereinafter appointed for a rehearing, or an appeal, or for an enrolment.

7. That these orders shall take effect on and from the twenty-eighth day of October next.

(Signed)

ST. LEONARDS, C.
JOHN ROMILLY, M. R.
J. L. KNIGHT BRUCE, L. J.
CRANWORTH, L. J.
G. J. TURNER, V. C.
RICHARD T. KINDERSLEY, V. C.
JAMES PARKER, V. C.

Under the 15 & 16 Vict. cap. 80. (1)

Summons.

The Right Honourable, &c.

1. The summons for the purpose of proceedings before the Master of the Rolls and Vice-Chancellors respectively at chambers, whether originating in chambers or not, may be in a form similar to the form set forth in schedule A. to these Orders, with such variations as the circumstances of the case may require.

2. The summons to be issued under section 20 of the act of the 15 & 16 Vict. c. 80, may be in a form similar to the form set forth in Schedule B. to these Orders, with such variations as the circumstances of the case may require.

(1) The cases decided upon these orders, are so few, that it has not been thought necessary to append them; the effect of them is stated, and they are quoted in the text.

3. A seal is forthwith to be provided for the chambers of the Master of the Rolls and each of the Vice-Chancellors, and summonses are to be prepared by the parties, and sealed by one of the clerks at the chambers of the judge from whose chambers they are issued, and a copy of such summons is to be left at the judge's chambers by the party obtaining such summons.

4. In cases of applications under the 15 & 16 Vict. c. 80, s. 45, applications for guardianship and maintenance of infants originating in chambers, and of all other applications originating in chambers, a duplicate of the summons is to be filed in the Record and Writ Office, and in cases where service is required, the copies served are to be stamped in the manner provided by section 46 of the act of 15 & 16 Vict. c. 86.

5. In cases where proceedings originate in chambers, the original summons is to be served seven clear days before the return thereof; all other summonses not being summonses referred to in Order 2, are to be served two clear days before the return thereof.

6. In cases where proceedings originate in chambers, and when from any cause the summons may not have been served upon any party seven clear days before the return thereof, an endorsement may be made upon the summons and upon a copy thereof stamped for service, appointing a new time for the parties, not before served, to attend at the chambers of the judge, and such endorsements are to be sealed at the judge's chambers, and the service of the copies so endorsed and sealed is to have the same force and effect as the service of the original summons; and when any party has been served before such endorsement, the hearing thereof may, upon the return of the summons, be adjourned to the new time so appointed.

Appearances.

7. In all cases where proceedings originate in chambers, the parties served are, before they are heard in chambers, to enter appearances in the Record and Writ Office, and to give notice thereof.

Orders and Directions applicable to all Cases whether originating in Chambers or not.

8. In all cases in which by any order any accounts are directed to be taken, or inquiries to be made, each direction shall be numbered, so that as far as may be, each distinct account and inquiry may be designated by a number, and such order may be in the form set forth in Schedule C. to these Orders, with such variations as the circumstances of the case may require.

9. Where an order is made directing an account of debts, claims, or liabilities, or an inquiry for next-of-kin or other unascertained persons, unless otherwise ordered, all persons who do not come in and prove their claims within the time which may be fixed for that purpose by advertisement, are to be excluded from the benefit of the order.

10. When an order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest is to be computed on such debts or on such of them as carry interest, after the rate they respectively carry, and as to all others after the rate of four per cent. from the date of the order.

11. When an order is made directing an account of legacies, unless otherwise ordered, interest is to be computed on such legacies after the rate of four per cent. per annum, from the end of one year after the deceased's death, unless any other time of payment or rate of interest is directed by the will, and in that case according to the will.

12. Where an order is made directing any property to be sold, unless otherwise ordered, the same is to be sold with the approbation of the judge to whose court the cause or matter is attached, to the best purchaser that can be got for the same, to be allowed by such judge, and all proper parties are to join them as such judge shall direct.

13. When an order is made directing a receiver to be appointed, unless otherwise ordered, the person to be appointed is first to give security to be allowed by the judge to whose court the cause is attached, and taken before an officer or agent of the court in the country, if there shall be occasion, duly to account for what he shall receive on account of the rents and profits, for the receipt of which he is to be appointed, at such period, as such judge shall appoint, and to account for and pay the same as the court shall direct, or as the case may be, to be answerable for what he shall receive in respect of the personal estate, for the getting in and collection of which he is to be appointed, and to account for and pay the same as the court shall direct; and the person so to be appointed is to be allowed a proper salary for his care and pains in receiving such rents and profits, or as the case may be, to have an allowance made to him in respect of his collecting such personal estate.

14. The General Order of the court, with respect to receivers, shall, *mutatis mutandis*, apply to receivers appointed under orders made after these rules and regulations come into operation.

15. Recognizances which have been heretofore given to the Master of the Rolls, and the senior master, in order, are hereafter to be given to the Master of the Rolls and senior Vice-Chancellor for the time being.

Proceedings in Chambers.

16. In all cases where matters in respect of which summonses have been issued, are not disposed of upon the return of the summons, the parties are to attend from time to time without further summons, at such time or times as may be appointed for the consideration or further consideration of the matter.

17. In all cases of proceedings in chambers under any order, the solicitor prosecuting the same shall leave a copy of such order at the judge's chambers, and shall certify the same to be a true copy of the order as passed and entered.

18. Upon a copy of the order being left, a summons is to be issued to proceed with the accounts or inquiries directed, and upon the return of such summons, the judge is to be satisfied by proper evidence that

all necessary parties have been served with notice of the order, and thereupon directions are to be given as to the manner in which each of the accounts and inquiries is to be prosecuted; the evidence to be adduced in support thereof, the parties who are to attend on the several accounts and inquiries, and the time within which each proceeding is to be taken; and a day or days may be appointed for the further attendance of the parties, and all such directions may afterwards be varied or added to as may be found necessary.

19. If upon the hearing of the summons it shall appear to the judge that by reason of absence or for any other sufficient cause, the service of notice of the order upon any party cannot be made or ought to be dispensed with, the judge may, if he shall think fit, wholly dispense with such service, or may, at his discretion, order any substituted service, on notice, by advertisement or otherwise, in lieu of such service.

20. If in the prosecution of the order it shall appear to the judge that it would be expedient that further accounts should be taken or further inquiries made, he may order the same to be taken or made accordingly, or if desired by any party, he may direct the same to be considered in open court.

21. At the time any summons or appointment is obtained, an entry thereof is to be made in a book to be called "The Summons and Appointment Book," stating the date on which the summons is issued, or appointment made, the name of the cause or matter, and by what party, and, shortly, for what purpose such summons or appointment is obtained, and at what time returnable.

22. Lists of matters appointed for each day are to be made out and affixed outside the doors of the chambers of the respective judges, and subject to any special directions, such matters are to be heard in the order in which they appear on such list.

23. The course of proceeding in chambers is ordinarily to be the same as the course of proceeding in court upon motion. No statements of facts, charges, or discharges are to be brought in; but when directed, copies, abstracts, or extracts of or from accounts, deeds, or other documents, and pedigrees and concise statements are to be supplied for the use of the judge and his chief clerk, and when so directed, copies are to be handed over to the other parties. But no copies to be made of deeds or documents when the originals can be brought in, without special directions.

24. The party intending to use any affidavit in any proceeding in chambers, is to give notice to the other parties concerned, of his intention in that behalf.

25. The practice of the court with respect to evidence before the hearing, when applied to evidence to be taken before an examiner in any cause subsequently to the hearing, is to be subject to any special directions, which may be given in any particular case.

26. When a chief clerk is directed by the judge to examine any witness, the practice and mode of proceeding is to be the same as in the case of the examination of witnesses before the examiner, subject to any special directions which may be given in any particular case.

27. The original examinations and depositions of parties and wit-

nesses taken by or before the chief clerk, authenticated by his signature, are to be transmitted by him to the Record and Writ Office to be there filed, and any party to the suit or proceeding may have a copy thereof; or of any part or portion thereof, upon payment of the proper fee.

28. All orders made in chambers, and drawn up by the chief clerks or registrars, are to be entered in the same manner and in the same office as orders made in open court are entered.

29. Where any account is directed to be taken, the accounting party is, unless the judge shall otherwise direct, to make out his account and verify the same by affidavit; the items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and to be left in the judge's chambers.

30. Any party seeking to charge any accounting party beyond what he has by his account admitted to have received, is to give notice thereof to the accounting party, stating so far as he is able, the amount sought to be charged, and the particulars thereof in a short and succinct manner.

31. Upon a receiver's account being left in the judge's chambers to be prepared, a summons to proceed thereon is to be taken out, and the account, when passed, is to be entered by the solicitor of the receiver in books, in the same manner as heretofore, but the affidavits verifying the account so passed is to refer to it as an exhibit, and not to be annexed to it.

32. When a receivership has been completed, the book containing the accounts is to be deposited in the Record and Writ Office.

33. Where advertisements are required for any purpose, a peremptory and only one is to be issued, unless for any special reason, it may be thought necessary to issue a second advertisement or further advertisements; and any advertisement may be repeated as many times, and in such papers as may be directed.

34. The advertisements are to be prepared by the solicitor, and submitted to the chief clerk for approval, and when approved, are to be signed by him, and such signature is to be sufficient authority to the printer of the *Gazette* to insert the same,

35. Advertisements for creditors or other claimants are to fix a time for the creditors or claimants to come in and prove their claims, and to appoint a day for the hearing and adjudicating them, and may be in a form similar to the form set forth in Schedule D. to these Orders, with such variation as the circumstances of the case may require.

36. Claimants coming in pursuant to advertisement are to enter their claims at the chambers of the judge, in the "Summons and Appointment Book," for the day appointed for hearing by the advertisement, and are to give notice thereof, and of the affidavits filed, to the solicitors in the cause within the time specified in the advertisement for bringing in claims.

37. The claimants filing affidavits are not to be required to take office copies, but the party prosecuting the cause or matter is to take office copies, and produce the same at the hearing unless otherwise ordered in chambers.

38. If on the day appointed for hearing the claims, they are not

disposed of, an adjournment day for hearing such claims is to be fixed ; and when further evidence is to be adduced, a time may be named within which the evidence on both sides is to be closed, and directions may be given as to the mode in which such evidence is to be adduced.

39. Any claimant who has not before entered his claim may be heard on such adjournment day, provided he enters his claim, and files his affidavit four clear days prior to such day, and no certificate of debts or claims shall, in the mean time, have been made.

40. Creditors claiming debts not exceeding five pounds, need not attend on the day of hearing, unless required to do so by notice from some party.

41. After the time fixed by the advertisement, no claims are to be received, except as before provided in case of an adjournment, unless the judge at chambers shall think fit to give special leave, upon application made by summons, and then upon such terms and conditions as to costs and otherwise as the judge shall think fit.

42. A list of all claims allowed shall, when signed by the judge, be made out and left in the judge's chambers by the party prosecuting the order.

43. In cases where the court directs any computation of interest in the apportionment of any fund, which is to be acted upon by the Accountant-General or other person without any further order from the court, the order to be made by the court may direct such computation or apportionment to be made by one of the chief clerks attached to the court of such judge, and may direct the certificate thereof, signed by such chief clerk, to be acted upon accordingly, without the same being signed and adopted by the judge.

44. When an account has been directed, the certificate or report is to state the result of such account, and not to set the same out by way of schedule, but is to refer to the account verified by the affidavit filed, and to specify by the numbers attached to the items in the account, which, if any of such items have been disallowed or varied, and to state what additions, if any, have been made by way of surcharge. In any case in which the account verified by the affidavit has been so altered that it is necessary to have a fair transcript of the account as altered, such transcript may be required to be made by the solicitor prosecuting the order, and is then to be referred to by the certificate or report. The account and the transcripts if any referred to by certificates or reports, are to be filed therewith, but no copies thereof are to be required to be taken by any party.

45. The certificates or reports to be made by the chief clerk to the judge are not, except the special circumstances of the case shall render it necessary, to set out the order, or any documents or evidence or reasons, but are to refer to the order, documents, and evidence, or particular paragraphs thereof, so that it may appear upon what the result in any such certificate or report is founded.

46. The certificate of the chief clerk to the judge may be in a form similar to the form set forth in Schedule E. to these Orders, with such variations as the circumstances of the case may require, and when prepared and settled, it is to be transcribed by the solicitor prosecuting the

proceedings in such form, and within such time as the chief clerk shall require, and is then to be signed by the chief clerk at an adjournment to be made for that purpose. But where, from the nature of the case, the certificate can be drawn and copied in chambers whilst the parties are present before the chief clerk, the same shall then be completed and signed by him without any adjournment.

47. The time within which any party is to be at liberty to take the opinion of the judge, upon any proceeding which shall have been concluded, but as to which the certificate or report of a chief clerk shall not have been signed and adopted by the judge, is to be four clear days after the certificate or report shall have been signed by the chief clerk.

48. Any party desiring to take the opinion of the judge as mentioned in the last preceding rule, is within four clear days after the certificate or report shall have been signed by the chief clerk, to obtain a summons for such purpose.

49. At the expiration of four clear days after the certificate or report shall have been signed by the chief clerk, if no party has in the mean time, obtained a summons to take the opinion of the judge thereon, the chief clerk is to submit the certificate or report to the judge for his approval, and the judge may thereupon, if he approve the same, sign such certificate or report in testimony of his approbation thereof, as follows: "Approved this day of ."

50. The certificate or report, when signed by the judge, with the accounts, if any, to be filed therewith, is to be transmitted by the chief clerk to the Report Office to be there filed.

51. The time within which an application may be made by summons or motion to discharge or vary any certificate or report, which has been signed and adopted by the judge sitting in chambers, is to be eight clear days after the filing of such certificate or report.

52. Certificates of the chief clerk made as mentioned in rule 43, and not required to be signed and adopted by the judge, are to be transmitted and filed in the same manner as those adopted by the judge.

53. The Orders 47, 48, 49, and 51, are not to apply to certificates on passing receivers' accounts; such accounts may be adopted and signed by the judge without delay, and upon being so signed are to be filed and forthwith acted upon.

54. A register is to be kept of all proceedings in the judge's chambers with proper clerks, so that all the proceedings in each cause or matter may appear consecutively and in chronological order, with a short statement of the questions or points decided or ruled at any hearing.

55. Parties attending any proceedings at chambers, without having obtained the previous leave of the judge to attend the same, are not to be allowed the costs of such attendance, unless by special order of the court.

56. The costs of counsel attending the judge in chambers are not, in any case, to be allowed, unless the judge certifies it to be a proper case for counsel to attend.

Deposit of Deeds.

57. When any deeds or other documents are ordered to be left or deposited, the same are to be left or deposited in the Record and Writ Office, and are to be subject to such directions as may be given for the production thereof.

Power of Judge.

58. Powers and authorities given to the Masters in Ordinary of the Court of Chancery, by any General Order or Orders of the court, may be exercised by the judge sitting in chambers.

59. The power of the court and of the judge sitting in chambers, to enlarge or abridge the time for doing any act or taking any proceedings, and to give any special directions as to the course of proceeding in any cause or matter, are unaffected by these Orders.

Commencement of these Orders.

60. These Orders shall take effect and come into operation from and after the first day of Michaelmas Term, 1852.

Interpretation.

61. In these Orders the following words have the several meanings hereby assigned to them over and above their ordinary meanings, unless there be something in the subject or context repugnant to such construction, viz:—

1. Words importing the singular number include the plural number, and words importing the plural number include the singular number.
2. Words importing the masculine gender include females.
3. The word "party" includes a body politic or corporate.
4. The word "affidavit" includes "affirmation."
5. The word "order" includes decree and decretal order.
6. The word "receiver" includes consignee and manager.

ST. LEONARDS, C., &c. &c.

SCHEDULE (A.)

Form of Summons.

In Chancery—

In the matter of John Thomas, an infant, or
Joseph Wilson against William Jackson.

Let all parties concerned attend at my chambers (in the Rolls Yard, Chancery Lane, Middlesex (or at No. , Square, Lincoln's Inn, Middlesex), on the day of , at o'clock in the noon, on the hearing of an application on the part of [*here state on whose behalf the application is made, and the precise object of the application.*]

Dated the day of , 1852.

JOHN ROMILLY, M. R., or
G. J. TURNER, V. C., or
RICHARD T. KINDERSLEY, V. C., or
JOHN STUART, V. C.

This summons was taken out by A. and B. of Lincoln's Inn, in the county of Middlesex, solicitors for .

To

The following note to be added to the original summons, when proceedings originate in chambers, and when the time is altered by endorsement, the endorsement to be referred to as below:—

NOTE.—If you do not attend us in person or by your solicitor at the time and place above mentioned (or at the place above mentioned at the time mentioned in the endorsement hereon), such order will be made, and proceedings taken, as the judge may think just and expedient.

N.B.—The form of summons to be obtained under section 45 of the act 15 & 16 Vict. c. 86, is prescribed by rule 42 of the Orders 7th August, 1852.

SCHEDULE (B.)

Form of Summons by Chief Clerk.

In Chancery—

In the matter of the estate of John Thomas, late of , in the county of , deceased, or
Joseph Wilson against William Jackson.

The defendant William Jackson (or A. B. of, &c.), is hereby summoned to attend at the chambers of the Master of the Rolls (or Vice-
[CH.] 2 D

Chancellor), in the Rolls Yard, Chancery Lane (or No. , Square, Lincoln's Inn, Middlesex), on the day of , at of the clock in the noon, to be examined (or to be examined as a witness, on the part of the for the purpose of the proceedings directed by the Master of the Rolls (or the said Vice-Chancellor), to be taken before me.

Dated this day of , 1852.

A. B.
Chief Clerk.

This summons was taken out by A. and B. of Lincoln's Inn, in the county of Middlesex, solicitors for .

SCHEDULE (C.)

Form of Order.

This court doth order that the following accounts and inquiries be taken and made, that is to say—

1. An account of the personal estate, not specifically bequeathed, of A. B. deceased, the testator in the pleadings named, come to the hands of, &c.
2. An account of the said testator's debts.
3. An account of the said testator's funeral expenses.
4. An account of the said testator's legacies.
5. An inquiry what parts, if any, of the said testator's personal estate, are outstanding or undisposed of.

And it is ordered that the said testator's personal estate not specifically bequeathed, be applied in payment of his debts and funeral expenses in a course of administration, and then in payment of his legacies.

And it is ordered that the following further accounts and inquiries be taken and made, that is to say—

6. An inquiry what real estate the said testator was seised of or entitled to at the date of his will, and at the time of his death.
7. An inquiry what incumbrances affect the said testator's real estate.
8. An account of the rents and profits of the said testator's real estate received by, &c.
9. And it is ordered that the said testator's real estate be sold.

And it is ordered that the further consideration of this cause be adjourned, and any of the parties are to be at liberty to apply as they may be advised.

SCHEDULE (D.)

Form of Advertisement.

Pursuant to a decree or order of the High Court of Chancery, made in a cause

against

the creditor of (or persons claiming to be next-of-kin to or the heir of, *as the case may be*), late of in the county of , are by their solicitors, on or before the day of , to come in and prove their debts or claims at the chambers of the Master of the Rolls, in the Rolls Yard, Chancery Lane. (or of the Vice-Chancellor, No. , Square, Lincoln's Inn, Middlesex), or in default thereof, they will be peremptorily excluded from the benefit of the said decree or order.

Monday the day of , at in the noon, at the said chambers, is appointed for hearing and adjudicating upon the claims.

Dated this day of 1852.

A. B.
Chief Clerk.

SCHEDULE (E.)

Form of Certificate of Chief Clerk.

In the matter of (or between) [*state title*], I hereby certify that the result of the accounts and inquiries which have been taken and made in pursuance of the order in this cause, dated the day of , is as follows:—

1. The defendants the executors of the testator, have received personal estate to the amount of £ , and they have paid, or are entitled to be allowed on account thereof, sums to the amount of £ , leaving a balance due from (or to) them of £ , on that account.

The particulars of the above receipts and payments appear in the account marked , verified by the affidavit of filed on the day of , and which account is to be filed with the certificate, except that in addition to the sums appearing on such account to have been received, the defendants are charged with the following sums [*state the same here or in a schedule*], and except that I have disallowed the items of disbursement in the said account numbered , and ; [*or in cases where a transcript has been made*], the defendants have brought in an account verified by the affidavit of , and which account is marked , and is to be filed with this certificate. The account has been altered, and the account marked , and which is also to be filed with this certificate, is a transcript of the account as altered and passed.

2. The debts of the testator which have been allowed are set forth in the schedule hereto, and with the interest thereon, and costs mentioned in the schedule, are due to the persons therein named and amount altogether to £ .
3. The funeral expenses of the testator amount to the sum of £ , which I have allowed the said executors in the said account of personal estate.
4. The legacies given by the testator are set forth in the schedule hereto, and with the interest therein mentioned remain due to the persons therein named, and amount altogether to £ .
5. The outstanding personal estate of the testator consists of the particulars set forth in the schedule hereto.
6. The real estate to which the testator was entitled, consists of the particulars set forth in the schedule hereto.
7. The incumbrances affecting the testator's real estate, are specified in the schedule hereto.
8. The defendants have received rents and profits of the testator's real estate, &c., [*in a form similar to that provided with respect to the personal estate.*]
9. The real estates of the testator directed to be sold have been sold, and the purchase money, amounting altogether to £ , has been paid into court.

N.B.—The above numbers are to correspond with the numbers in the decree.

After each statement the evidence^A produced is to be stated as follows:—

The evidence produced on this account (or inquiry), consists of the probate of the testator's will, the affidavit of A. B. filed, and paragraph No. , of the affidavit of C. D. filed.

ST. LEONARDS, C., &c. &c.

Order of 23rd October, 1852.

The Right Honourable, &c.

I. The chief clerks of the Master of the Rolls and Vice-Chancellors respectively, are directed to take the following fees:—

	£	s.	d.
1. For every original summons for the purpose of proceedings originating in chambers	0	5	0
2. For every duplicate thereof	0	5	0
3. For every other summons	0	3	0
4. For every advertisement	1	0	0
5. For every certificate or report	1	0	0
6. For every certificate upon the passing of a receiver's or consignee's account, a further fee in respect of each 100 <i>l.</i> received of	0	10	0
7. For every order drawn up by the chief clerk, made upon applications for time to plead, answer, or demur, for leave to amend bills or claims, or for enlarging publication, or the period for closing evidence, or for the production of documents, or applications relating to the conduct of suits or matters	0	5	0
8. For every other order drawn up by the chief clerk ...	1	0	0

II. The registrars are directed to take the following fees for orders made by a judge in chambers, drawn up by the registrars, the like fees as before directed to be taken by the chief clerks for orders drawn up by him.

III. The Record and Writ Clerks are directed to take the following fees:—

For office copies of original depositions and examinations, per folio.....	0	0	4
For entering appearance to judge's summons, same charge as for appearing to a bill.			
For stamping every copy of a bill or claim for service ...	0	5	0
For stamping every copy of a judge's summons for service	0	5	0
For examining every copy or part of a copy of a set of interrogatories, and marking same as an office copy	0	5	0

IV. All fees received by officers of the court under the preceding orders, are to be accounted for and paid by them respectively, once in every month into the Bank of England, in the name of the Accountant-General, to be placed to the account there entitled "The Suits' Fee Fund Account," the amount so received and paid by such officers respectively to be verified by the affidavit of the accounting party.

V. Solicitors are entitled to charge and be allowed the following fees:—

For instructions to commence proceedings originating in chambers, and to defend the same	0	13	4
For preparing an original summons for the purpose of proceedings originating in chambers, and the duplicate thereof	0	13	4

	£	s.	d.
For attending at chambers to get such such summons and duplicate examined and sealed	0	6	8
For attending at the Record and Writ Office to file duplicate and examine copies, and get same stamped	0	6	8
For endorsing a summons and the copies under Order VI. of 16th October, 1852, and attending to get same sealed	0	6	8
For entering the appearance for one or more defendants, if not exceeding three	0	6	8
If exceeding three, for every additional number not exceeding three, an additional sum of	0	6	8
In cases of proceedings originating in chambers, the same term fee as in a suit			
For preparing every other summons, and attending to get same filled up and sealed at chambers	0	6	8
For each copy of a summons to serve or leave at chambers	0	2	0
For attending on a summons or other appointment, each day a fee of 6s. 8d., 13s. 4d., or 1l. 1s., according to circumstances. but the fee is to be 6s. 8d., unless a larger fee is allowed by the judge or his chief clerk.			
When from the length of the attendance, or from the difficulty of the case, the judge shall think the highest of the above fees an insufficient remuneration for the services performed, or where the preparation of the case to lay it before the judge shall have required skill and labour for which no fee has been allowed, the judge may allow such further fee, not exceeding one guinea, as, in his discretion, he may think fit.			
For preparing every advertisement.....	0	6	8
For attending to get same approved and signed	0	6	8
For attending for every order drawn up by the chief clerk, and at the Registrar's Office to get same entered	0	6	8
For attending to enter claim under Order XXXVI. of 16th October, 1852, and to file affidavit	0	6	8
For perusing the affidavits of claimants coming in under Order XXXVI. of 16th October, 1852, at the time appointed by the advertisement, when the number of the claimants does not exceed five.....	1	1	0
When the number exceeds five, for every additional number not exceeding five, an additional sum of	1	1	0
For attending to bespeak and procure office copy of certificate or report	0	6	8
For all other business performed, such fees as by the practice of the court they are entitled to for similar business.			

Order of 25th October, 1852.

The Right Honourable Edward Burtenshaw, Lord St. Leonards, &c.

I. In lieu of copies of pleadings and other proceedings in the Court of Chancery, and of the documents relating thereto, being made and delivered by officers of the court at the office in which they are filed or left, copies of such pleadings, proceedings, and documents save as hereinafter excepted), are to be made, delivered, charged, and paid for according to the following regulations:—

1. The following copies are exempted from this Order: that is to say, office copies of proceedings filed in the Report Office, office copies of answers, pleas, and demurrers, office copies of depositions of witnesses, and examination of parties to be made for and taken by the party on whose behalf such depositions and examinations have been taken, office copies of affidavits to be made for and taken by the party filing the same, and office copies of affidavits to be taken under Order XXXVII. of 16th October, 1852.
2. The party or his solicitor requiring any copy, save as hereinbefore excepted, is to make a written application to be delivered to the party by whom the copy is to be furnished, or his solicitor, with an undertaking to pay the proper charges.
3. Upon such requisitions being made with such undertaking as aforesaid, copies of such pleadings, proceedings, or documents are to be made by the party or his solicitor filing or leaving the same, or who, under the first rule, may have taken office copies thereof.
4. The copies are to be ready to be delivered at the expiration of forty-eight hours after the delivery of such request and undertaking, or within such other time as the court may in any case direct, and are to be delivered accordingly, upon demand and payment of the proper charges.
5. The charges for all such copies are to be at the rate of fourpence per folio.
6. Copies of bills of costs are to be made side for side, so as to correspond with the bills of costs left in the office.
7. The folios of all copies are to be numbered consecutively in the margin thereof, and the name and address of the party or solicitor by whom the same is made, is to be indorsed thereon in like manner as upon the proceedings in the court, and such party or solicitor is to be answerable for the same being true copies of the original, or of an office copy of the original pleadings, proceedings, or document of which it purports to be a copy, as the case may be.
8. In cases of *ex parte* applications for injunctions or writs of *ne exeat regno*, the party making such application is to deliver copies of the affidavits upon which it is granted upon payment of the proper charges immediately upon the receipt of such written request and undertaking as aforesaid, or within such time as may be specified in such request, or may have been directed by the court.
9. Any party or solicitor who has taken any office copy mentioned in

rule 2, is to produce the same in court or at the judge's chambers, when required for the purpose of the proceedings to which the same relate.

II. That all office copies and copies to be furnished by parties or their solicitors, shall be written on paper of a convenient size, with a sufficient margin, and in a neat and legible manner, similar to that which is usually adopted by law stationers, and in the case of copies to be furnished by parties or their solicitors, unless so written, the parties or solicitors furnishing them shall not be entitled to be paid for the same.

III. That in case any solicitor who shall be required to furnish any such copy as aforesaid, shall either refuse, or for two clear days from the time when the application for such copy shall have been made, shall neglect to furnish the same, the person by whom such application shall be made shall be at liberty to procure a copy from the office in which the original shall have been filed, in the same way as if no such application had been made to the solicitor; and in such case no costs shall be due or payable to the solicitor so making the default in respect of the copy or copies so applied for.

IV. That in case any solicitor by whom any such copy ought to be furnished, shall neglect to do so for such two clear days as aforesaid, or for one clear day, an addition of two clear days, or one clear day, as the case may be, shall be made to the period within which any proceeding which may have to be taken, after obtaining such copy, ought to be so taken, so that the person requiring such copy may be as little prejudiced as possible by such neglect as aforesaid.

V. That the Taxing Master shall not allow any costs in respect of any copy so taken as aforesaid, unless the same shall appear to him to have been requisite, and to have been made with due care, both as regards the contents and the writing thereof.

VI. That from and after the first day of November next, all the fees now payable in relation to such proceedings in the said court, as are mentioned in the first schedule hereinafter contained shall be abolished, and the fees specified in the second part of such schedule shall be payable, and the same (save as provided by the seventh of these Orders), shall be collected, not in money, but by means of stamps denoting the amount of such fees, stamped or affixed at the expense of the parties liable to pay the fees, on or to the vellum, parchment, or paper on which the proceedings in respect whereof such fees are payable, are written or printed, or which may be otherwise used in reference to such proceeding. And where any of the fees specified in the second part of the said first schedule, shall be payable in respect of any matter or thing to be done by any officer, or in any office of the court, and it shall not have been customary to use any written or printed document or paper, in reference to such matter or thing, whereon the stamp could be affixed, the party or his solicitor requiring such matter or thing to be so done, shall make application for the same, by a short note or memorandum in writing, and a stamp denoting the amount of the fee so payable shall be stamped on, or affixed to, such note or memorandum.

VII. That in all cases where the costs are directed to be paid out of

a fund in court, the fees of taxation shall not be payable by means of stamps, but shall be carried over by the Accountant-General to the credit of the Suitors' Fee Fund, and to that intent the Taxing-Master shall in such cases certify the amount of such fees.

VIII. That from and after the 28th of October, 1852, the brokerage which shall or may from time to time be received by the Accountant-General of the Court of Chancery shall be paid by him, on the first day of every month, or as soon after as conveniently may be, into the Bank of England, to be there placed to his credit as such Accountant-General, to the account intitled "The Suitors' Fee Fund Account."

IX. That, subject to the superintendence and direction of the Accountant-General of the Court of Chancery, with the approbation of the Lord Chancellor, the first, second, and third clerks in each division of the Accountant-General's Office shall, from and after the said 28th day of October, 1852, and until other order or provision shall be made in that behalf, continue to perform the acts or duties hitherto performed by such clerks, and which are mentioned in the said second schedule, in addition to the duties prescribed by act of Parliament as heretofore; and such fees as are specified in the second schedule hereto shall be paid for such acts as aforesaid, to be accounted for in like manner as the other fees now received in the office of the said Accountant-General, and to be collected by means of stamps, in like manner as provided by Order VI., and from and after the said 28th day of October, 1852, no other person shall perform such acts or duties. And in order to enable the Lord Chancellor, with the consent of the Commissioners of Her Majesty's Treasury, from time to time to fix the amount of the yearly salaries to be paid to such clerks, the Accountant-General shall every six months make a return to the Lord Chancellor of the amount received during the preceding six months, in respect of such fees.

The first Schedule to which the foregoing Orders refer:—

PART. I.—*Fees now payable which are to be abolished.*

MASTERS' OFFICE.

	£	s.	d.
For drawing every report exclusive of schedules of accounts of parties accounting before the Masters, and exclusive of the fee on signing, per folio	0	1	0
For drawing schedules of accounts of parties accounting before the Master, per folio.....	0	0	6
For taking the acknowledgment of any deed.....	0	6	0
For searching for papers in a cause or matter not in immediate progress before the Master.....	0	6	8
For entering accounts of receivers, consignees, and committees, per folio, in each book.....	0	0	4
For entering accounts of parties accounting before the Master in a book, if required, per folio.....	0	0	4
For every exhibit.....	0	2	6
When a Master shall be required to attend a party to administer an oath, there shall be paid a further fee of 10s.			

	£	s.	d.
over and besides the coach-hire or reasonable travelling expenses of the Master	0	10	0
And for copies of every document or writing made in the Master's Office, and also for the transcript of every report, pursuant to the act of Parliament 3 & 4 Will. 4, c. 94, and the General Orders of 26th October, 1842, per folio.....	0	0	4

REGISTRAR'S OFFICE.

1. For every decree or order on the original hearing of the cause and on further directions	3	10	0
2. For every office copy	2	0	0
3. For every order on petition or motion of course, not exceeding one side.....	0	3	0
4. For every additional side of such order	0	1	0
5. For every order on other petitions where the reference is directed, but the decision of the Master is not to be final, and also where the petition is dismissed.....	0	10	0
6. For every office copy thereof	0	10	0
7. For every order for a special injunction or for the appointment of a receiver	2	10	0
8. For every office copy	1	0	0
9. For every order for payment of money out of court, and for no other purpose, where the sum or sums thereby specifically directed to be paid shall not exceed in the whole 100 <i>l.</i>	0	10	0
10. For every office copy thereof	0	5	0
11. For every order of transfer out of court or sale of any sum or sums of government stock or South Sea Annuities (excepting long annuities and annuities for terms of years), and for no other purpose, where the sum or sums thereby specifically directed to be transferred or sold shall not exceed in the whole 100 <i>l.</i> stock or annuities.....	0	10	0
12. For every office copy thereof	0	5	0
13. For every order for payment out of court of any annuity or annuities, not exceeding in the whole 5 <i>l.</i> per annum, or of any interest or dividends upon stock or annuities not exceeding 5 <i>l.</i> per annum, and for no other purpose	0	10	0
14. For every office copy thereof	0	5	0
14 <i>a.</i> For every office copy of every other order for payment or transfer out of court	1	0	0
15. For every other order on special motions.....	1	0	0
16. For every office copy thereof	0	10	0
17. For every order on arguing exceptions	2	0	0
18. For every office copy thereof	1	0	0
19. For every order on arguing pleas and demurrers.....	1	0	0
20. For every office copy thereof	0	10	0
21. For every order on petition of appeal or rehearing	2	0	0
22. For every office copy thereof	1	0	0

	£	s.	d.
23. For every order on petitions not herein otherwise specified	2	0	0
24. For every office copy thereof	1	0	0
25. For every order in any matter of lunacy.....	0	10	0
26. For every office copy thereof	0	5	0
27. For every order in any matter of bankruptcy	0	10	0
28. For every office copy thereof	0	5	0
29. For every office copy of a petition of appeal on the rehearing, per side.....	0	0	6
30. For every order on the hearing of a claim on further directions	2	0	0
31. For every office copy thereof	0	10	0
32. For every order on arguing exceptions (on claim)	1	0	0
33. For every office copy thereof	0	5	0
34. For every order (on a claim) for transfer out of court, or sale of any government stock, &c., exceeding 100 <i>l.</i> stock or annuities; and for every order for payment out of court of any annuity or annuities, or of any interest or dividends upon stock or annuities, exceeding in the whole 5 <i>l.</i> per annum	1	10	0
35. For every office copy thereof	0	10	0
36. For every order for payment of money out of court where the sum or sums thereby directed to be paid shall exceed 100 <i>l.</i> , and shall not exceed in the whole 500 <i>l.</i> , and for transfer out of court, or sale of any sum or sums of government stock or South Sea Annuities (excepting long annuities or annuities for terms of years), when the sum or sums thereby directed to be transferred or sold shall exceed 100 <i>l.</i> , and shall not exceed in the whole 500 <i>l.</i> , and for payment out of court of any annuity or annuities not exceeding 5 <i>l.</i> , and not exceeding in the whole 25 <i>l.</i> per annum, or of any interest or dividends upon stock or annuities exceeding 5 <i>l.</i> and not exceeding in the whole 25 <i>l.</i> per annum, and for no other purpose.....	1	0	0
37. For every office copy thereof	1	10	0
38. For every other order for payment or transfer out of court	2	0	0

REPORT OFFICE.

Searches 6 <i>d.</i> per year	0	0	6
Examination of office copies for evidence, per folio of ninety words.....	0	0	1½

ENTERING SEATS.

For every order or decree left for entry, containing 168 words on a side	0	0	6
For every certificate on Master's report	0	1	0
Entering every attachment.....	0	0	2

AFFIDAVIT OFFICE.

	£	s.	d.
For filing every affidavit, with or without schedules or other papers thereto annexed	0	0	4
For the registrar's or his deputy's hand to every copy of an affidavit, with or without schedules or other papers thereto annexed	0	1	0
For every search for an affidavit, for each time 6d., with the liberty of reading it over, if found	0	0	6
For searching for and taking an original affidavit off the file in order to attend the Lord Chancellor or Master of the Rolls therewith, or to be made use of in any court	0	6	8
For attending therewith at the Lord Chancellor's, or at any of the courts at Westminster, or in London, each time ...	0	6	8
For examining the copy of every affidavit with the original, in order to make use of such copy as evidence in any other court than the Court of Chancery	0	1	0
Taking affidavits for distringas	0	1	0
For carrying an original affidavit by the registrar or his deputy, to any assizes, for each day, including horse-hire and expenses	1	1	0
For trouble, attendance, and taking security to return an original affidavit to the office, when by an order of the court, such original affidavit is directed to be delivered to an associate or clerk of assize, to be made use of at the assizes	0	6	8
For every exhibit	0	2	6

EXAMINERS.

Every witness sworn, including oath	0	2	6
Every witness sworn and not examined, including oath.....	0	5	0
Every witness examined on close holidays	1	7	8
Examining copy of depositions, with record to prove on trial at law, if more than forty sheets, for each sheet	0	0	2

RECORD AND WRIT CLERKS.

Sealing special injunction	1	10	0
Re-sealing any writ, or any alteration thereof	0	3	0
Every exemplification, per skin, exclusive of parchment and duty	1	14	0
Amending every office copy, if more than ten folios, for every folio over	0	0	4
Search for records when in record-room, or for any person not being a party in the cause, for each year after the first year	0	1	0
Every exhibit to an affidavit, &c.....	0	2	6

TAXING MASTERS.

	£	s.	d.
For copies of bills of costs and other documents, per folio...	0	0	4
For drawing every report, per folio	0	1	0
Per-centage on amount of every bill of costs as taxed	2	10	0
For every exhibit	2	6	0

DOOR KEEPER OF THE COURT OF CHANCERY.

For every cause heard on each side	0	13	0
In every further directions, ditto	0	13	0
In every exceptions, each set.....	0	13	0
Every appeal or re-hearing, one side	0	13	0
Every plea or demurrer, one side	0	13	0
Every guardian, assigned	0	13	0
Out of 1 <i>l.</i> paid on setting down every petition	0	3	0
Every lunatic petition	0	3	0
Every witness examined <i>vivâ voce</i>	0	1	6
Every prisoner by <i>habeas corpus</i>	0	2	6
Setting down causes to be heard	1	0	0
Setting down cause at Rolls	1	0	0
Term fee for Attorney-General	1	10	0
Term-fee from Solicitor-General.....	1	0	0
Upon swearing into offices before the Lord Chancellor	2	12	6
From each Queen's Counsel, per term	1	12	0

ROLLS COURT—SECRETARIES.

For drawing and copying every order of course.....	0	5	6
For entering every order of course.....	0	0	6
For entering every order for setting down further directions, exceptions, pleas, and demurrers	0	0	6
For filing every petition for an order of course	0	1	0
For answering and setting down every petition for hearing...	0	6	6
For setting down every cause for hearing	1	0	0
For setting down every cause on further directions	0	12	6
For setting down every set of exceptions	0	10	0
For setting down every demurrer	0	10	0
For setting down every set of pleas.....	0	10	0
For setting down every rehearing	1	0	0
For advancing every cause.....	0	10	0
For entering every caveat against the enrolment of a decree or order	0	5	0
For every docket of decree or order signed by the Master of the Rolls.....	0	2	6
For every office copy of an order	0	0	6
For every fiat of enrolment	0	5	6
On hearing out of term, of every cause, further directions, pleas, demurrers, and, where decree is made, each party...	0	13	0

	£	s.	d.
On hearing of every petition in which an order is made, the petitioner pays	0	7	0
From each party, on the hearing of a cause in term time ...	0	2	6
From each party, on the hearing of a cause in Michaelmas and Hilary Terms only	0	1	0
For papers left at the Secretary's office for the Master of the Rolls, on further directions, exceptions, &c.....	0	5	0
For every recognizance vacated	0	6	0
On the appointment of every guardian in court for infants, out of term.....	0	7	0
For silk-gowns, a fee payable by each of Her Majesty's counsel attending at the Rolls Court, for each term	0	12	6

IN THE OFFICE OF THE ACCOUNTANT-GENERAL.

Certificate of payment in under order.....	0	2	0
Certificate of payment under act of Parliament.....	0	4	0
Certificate of transfers into court under order	0	2	0
Certificate of transfer under act	0	4	0
Certificate of investment of principal money	0	3	6
Certificate of investment of interest money	0	2	0
Certificate of sale of stock	0	2	6
Certificate of transfer of stock out of court.....	0	1	6
Carried over	0	2	6
Deposit of exchequer bills	0	5	0
Delivery out of exchequer bills	0	5	0
Investment of principal money in exchequer bills	0	5	6
Investment of interest money in exchequer bills.....	0	4	0
Sale of exchequer bills	0	5	0
Exchange of exchequer bills	0	5	0

CHANCERY SUBPŒNA OFFICE.

For every subpœna.....	0	5	6
For sealing every distringas	0	5	6
For filing affidavit	0	1	0

IN THE OFFICE OF THE SECRETARY OF DECREES AND INJUNCTIONS.

Enrolling Lord Chancellor's and Vice-Chancellor's decree...	0	10	6
The like, Master of the Rolls.....	0	10	6
Petition to enrol <i>nunc pro tunc</i>	0	1	0
Answering same.....	0	10	0
If private seal enrolling decree, extra.....	0	3	9
Searching, if decree enrolled or caveats entered.....	0	1	0

PART II.—*Fees to be collected by means of stamps.*

IN THE JUDGE'S CHAMBERS.

	£	s.	d.
For every original summons for the purpose of proceedings originating in chambers	0	5	0
For every duplicate thereof.....	0	5	0
For every other summons	0	3	0
For every order drawn up by the chief clerk made upon ap- plication for time to plead, answer, or demur, for leave to amend bills or claims, or for enlarging publication, or the period for closing evidence, or for production of documents or applications relating to the conduct of suits or matters	0	5	0
For every other order drawn up by the chief clerk.....	1	0	0
For every advertisement.....	1	0	0
For every certificate or report	1	0	0
For every certificate upon the passing of a receiver's and consignee's account, a further fee in respect of each 100 <i>l.</i> received, of.....	0	10	0

IN THE MASTERS' OFFICES.

For every warrant or summons	0	3	0
For every certificate or report.....	1	0	0
For taking the acknowledgment of every married woman ...	1	6	8
For attending any court, per day, by the clerk	0	14	0
For every oath	0	1	6
For every certificate upon the passing of a receiver and con- signee's account, a further fee in respect of each 100 <i>l.</i> received, of.....	0	10	0

IN THE REGISTRAR'S OFFICE.

For every decree or decretal order on the hearing of a cause, or on further directions, and on the hearing of a special case, including the court fee and the charge for entry ...	4	0	0
For every order for transfer or payment out of court of an amount not exceeding 200 <i>l.</i> stock, or cash, or interest on stock, not exceeding 10 <i>l.</i> per annum, and for every order on petition where the petition is dismissed	0	10	0
For every order for transfer or payment out of court of an amount exceeding 200 <i>l.</i> , but not exceeding 500 <i>l.</i> stock, or cash, or interest on stock, exceeding 10 <i>l.</i> per annum, and not exceeding 25 <i>l.</i> per annum, and for every order on special motion not herein otherwise specified	1	0	0
For every order on the hearing of claims, pleas, demurrers, exceptions, or on petitions not herein otherwise specified, or on petitions of appeal, rehearing for injunctions, re- ceivers, and for writs of <i>ne exeat regno</i>	2	0	0

	£	s.	d.
For every office copy of a petition of appeal or rehearing ...	1	0	0
For every order on petition or motion of course, including the entry thereof	0	5	0
For every office copy of a decree or order	1	0	0

IN THE REPORT OFFICE.

Upon every application for a search	0	0	6
For all office copies, at per folio.....	0	0	4

AFFIDAVITS.

For filing every affidavit, with or without schedules or other papers thereto annexed, including exhibits, if any.....	0	2	6
For the copy of every affidavit, for each folio.....	0	0	4
Upon every application to inspect an affidavit	0	0	6
Upon every application for the officer to attend with an affidavit or affidavits at the Lord Chancellor's, or at any of the courts at Westminster or in London, each day ...	0	10	0
Upon every application for the officer to carry an original affidavit to any assizes, for each day besides reasonable expenses of officer	1	0	0
For every deponent, affirmant, or declarant to an affidavit, affirmation, or declaration, sworn, affirmed, or declared in London, or within ten miles of Lincoln's Inn Hall.....	0	1	6
Upon any application for the officer to attend an invalid, including the attendance	0	10	0

IN THE EXAMINER'S OFFICE.

For filing interrogatories	0	7	0
For all office copies, per folio.....	0	0	4
For every witness sworn and examined, including oath, for each hour	0	5	0
For every witness sworn and examined abroad (besides coach hire, and reasonable expenses)	1	7	0
If more than five miles from the Examiner's office for the first day.....	2	15	0
For every other day	2	2	0
For attending the Lord Chancellor or the Master of the Rolls with record, per day	0	10	0
For attending any Master at his office	0	10	0
For attending with record in any other court or place in London or Westminster, per day.....	1	0	0
If in the country, per day, besides reasonable expenses	2	0	0
Upon every application to inspect depositions, including the inspection	0	3	0
Upon every application to examine copies of depositions, with record to prove on trial at law	0	5	0

	£	s.	d.
Upon every application to search book for causes, including search	0	1	0
Upon every application to search book for depositions, including search.....	0	1	0
N.B.—These fees will shortly cease to be payable when the new system comes into operation.			

IN THE RECORD AND WRIT CLERK'S OFFICE.

For all office copies, per folio.....	0	0	4
Filing every bill or information	1	0	0
For filing every claim.....	0	5	0
For filing every special case	1	0	0
Upon entering every appearance, if not more than three defendants	0	7	0
If more than three, and not exceeding six defendants	0	14	0
And the same proportion for every number of defendants.			
For sealing an attachment or distringas, for not appearing or answering	0	8	0
For every certificate	0	4	0
For every copy of a bill or claim to be served.....	0	5	0
For every writ of summons, distringas, or subpœna	0	5	0
For filing and entering duplicate of every judge's summons	0	5	0
For stamping every copy thereof	0	5	0
For sealing every other writ	1	0	0
For every oath, affirmation, declaration, or attestation upon honour	0	1	6
For examining every copy or part of a copy of a set of interrogatories, and marking same as an office copy ...	0	5	0
Upon every application for a search for a record, and for searching	0	2	0
Upon every application to inspect a record, and for inspecting the same	0	5	0
Upon every application to inspect exhibits, if occupied not more than one hour	0	5	0
If more than one hour, per diem.....	0	10	0
Upon every application for officer's attendance in courts of law, per diem, and for his attendance, besides reasonable expenses of the officer.....	1	0	0
Upon every application for the officer's attendance in a Court of Equity, per diem	0	10	0
For examining and signing enrolments of decrees and orders	3	0	0
For filing caveat against claim to revive, or against decree or order, or enrolment.....	0	5	0
For filing supplemental statement, or statement for revivor	0	10	0
For office copies of depositions taken before examiner, at per folio	0	0	4

IN THE TAXING MASTERS' OFFICE.

	£	s.	d.
For every warrant or summons, but not more than one order or summons is to be issued on one bill or set of bills, unless the Taxing Master shall think it necessary to issue a new warrant or summons	0	3	0
On signing every report and certificate	1	0	0
Upon the Master's certificate of every bill of costs, as taxed, where the amount shall not exceed 20 <i>l.</i>	0	10	0
Upon every additional 20 <i>l.</i> or fractional part thereof, a further fee of	0	10	0
For every oath, affirmation, or attestation upon honour	0	1	6

IN THE LORD CHANCELLOR'S PRINCIPAL SECRETARIES' OFFICE.

On all attendable petitions, appeals, rehearings, and letters missive	1	0	0
On all non-attendable petitions	0	10	0
On a matter of course, order on a petition of right	0	10	0
On an order for a commission on a petition of right	1	0	0

IN THE OFFICE OF THE SECRETARY AT THE ROLLS.

Of every petition set down for hearing, to include the fee on hearing	1	0	0
On the petition for every order of course.....	0	7	0
On the admission of every solicitor.....	1	17	0

The second Schedule to which the foregoing Order refers.

IN THE OFFICE OF THE ACCOUNTANT-GENERAL.

1. For preparing English power of attorney with affidavit, exclusive of stamp duty	0	3	6
2. For preparing foreign power of attorney without affidavit	0	3	0
3. For special power of attorney	0	5	0
4. For copies of accounts, debtor and creditor's side, per folio, as to be explained by General Order	0	0	3
5. Upon every application for a search	0	5	0

(Signed.)

Order of 10th November, 1852.

The Right Honourable Edward Burtenshaw, Lord St. Leonards, &c.

All office copies, and other copies of proceedings and documents, shall be counted after the rate of ninety words to the folio, and where the same or any portion thereof shall be written with columns containing figures, in every such case each figure or combination of figures representing a distinct denomination, shall be counted as one word, therefore 4151*l.* 16*s.* 9*d.* would count as three words.

Signed, &c.

Order of 3rd December, 1852.

The Right Honourable, &c.

1. That the Commissioners of Inland Revenue do prepare stamps impressed upon adhesive paper of the amounts following: that is to say, threepence, fourpence, eightpence, one shilling and fourpence, one shilling and sixpence, two shillings and sixpence, and two shillings and eightpence.

2. That such stamps shall be affixed by the parties requiring to use the same, on the vellum, parchment, or paper on which the proceeding in respect whereof such stamps may be required, is written, printed, or engrossed, or which may be otherwise used in reference to such proceeding.

3. That every officer of the Court of Chancery, who shall receive any document to which a stamp shall be so affixed, shall, immediately upon the receipt thereof, obliterate or deface such stamp, by impressing thereon a seal to be provided for that purpose, but so as not to prevent the amount of the stamp from being ascertained, and no such document shall be filed or delivered out, until the stamp thereon shall be obliterated or defaced as aforesaid.

Order of 4th December, 1852.

The Right Honourable, &c.

1. When no certificate of the taxation of a bill of costs shall be required, the *ad valorem* duty directed by the Order of the 25th day of October, to be levied by stamps on the Master's certificate, shall nevertheless be due, and shall be payable on the amount of the bill as taxed, or on the amount of such part thereof as may have been taxed. And the solicitor is, in such case, to cause the proper stamp (the amount thereof to be fixed by the Master) to be impressed on or annexed to the bill of costs.

2. The fees hereunder specified shall hereafter be collected, not in

money, but by means of stamps denoting the amount of such fees, stamped or affixed, at the expense of the parties liable to pay the fees, on or to the vellum, parchment, or paper on which the proceedings in respect whereof such fees are payable are written or printed, or which may be otherwise used in reference to such proceedings.

1. IN THE REGISTRAR'S OFFICE.

For orders made by a judge in chambers, drawn up by the Registrar, the like fees as by the Order of the 23rd of October, 1852, are directed to be taken by the chief clerks to the judges, for orders drawn up by such chief clerks.

2. IN THE RECORD AND WRIT CLERK'S OFFICE.

For amending every record of any bill	£0	10	0
For amending every office copy thereof	0	5	0
Copies of documents left as exhibits, per folio	0	0	4

Order of 16th December, 1852.

The Right Honourable, &c.

1. The business to be referred to the conveyancing counsel nominated by the Lord Chancellor under the 15 & 16 Vict. c. 80, s. 41, is to be distributed among such counsel in rotation by the first clerk to the registrars for the time being, and during his occasional or necessary absence, by the second clerk to the registrars for the time being, and during the occasional or necessary absence of both such clerks, then by such one of the other clerks to the registrars, as the first registrar for the time being may nominate for that purpose.

2. The clerk making such distribution as aforesaid is to be responsible that the business is distributed according to regular and just rotation, and in such manner as to keep secret from all persons the rota or succession of conveyancing counsel, to whom such business is referred; and it shall be his duty to keep a record of such references, with proper indexes, and to enter therein all such references.

3. When the court or a judge, sitting at chambers, shall direct any business to be referred to any such conveyancing counsel, a short memorandum or minute of such direction is to be prepared and signed by the registrar, if the same shall have been given in court, or by the judge's chief clerk if given in chambers, and the party prosecuting such direction, or his solicitor, is to take such memorandum or minute to the registrar's clerk, whose duty it shall be to make such distribution as aforesaid, and such clerk is to add at the foot thereof a note specifying the name of the conveyancing counsel in rotation, to whom such business is to be referred, and such memorandum or minute is to be left by the party prosecuting such direction, or his solicitor, with such con-

veyancing counsel, and shall be a sufficient authority for him to proceed with the business so referred.

4. In case the conveyancing counsel in rotation shall, from illness or from any other cause, be unable or decline to accept any such reference, the same shall be offered to the other conveyancing counsel appointed as aforesaid, successively, according to their seniority at the Bar, until some one of them shall accept the same.

5. The preceding Orders are not to interfere with the power of the court, or of the judge sitting at chambers, to direct or transfer a reference to any one in particular of the said conveyancing counsel, where the circumstances of the case may, in his opinion, render it expedient.

Order of 24th December, 1852.

The Right Honourable, &c.

1. When any of the Masters in Ordinary shall request the opinion of any of the conveyancing counsel nominated by the Lord Chancellor, under the 15 & 16 Vict. c. 80, s. 41, to be taken upon any matter depending before such Master, such business is to be laid before the conveyancing counsel in rotation, to be ascertained in the manner prescribed by the General Orders of the 16th day of December, 1852, and a memorandum or minute of every such request is to be prepared by the Master's chief clerk, and signed by him, and such memorandum or minute, when marked with the name of the conveyancing counsel in rotation, shall be a sufficient authority for such counsel to proceed with such business; and if the conveyancing counsel in rotation shall be unable or decline to proceed therewith, the same shall be offered to the other conveyancing counsel, nominated as aforesaid, successively, according to their seniority at the bar, until some one of them shall accept the same.

2. Where, under a decree or order of the court, whether already made, or hereafter to be made, any estate or interest shall be put up for sale with the approbation of one of the Masters in Ordinary, an abstract of the title to such estate or interest is, upon the request of the Master, to be laid before the conveyancing counsel in rotation, for the opinion of such counsel thereon, to the intent that the said Master may be the better enabled to give such directions as may be necessary respecting the conditions of sale of such estate or interest.

3. Notwithstanding the preceding Orders, the Master is to be at liberty to request the opinion of any one in particular of the said conveyancing counsel, to be taken upon any matter before such Master, where the circumstances of the case may render it expedient to do so.

Order of 31st January, 1853.

I, the Right Honourable, &c.

That the registrar, in drawing up any decree or order whereby the Accountant-General shall be directed to pay or transfer any fund or part of any fund, in respect of which any duty shall be payable to the revenue, under the acts relating to legacy duty, shall, unless such decree or order expressly provide for the payment of the duty, direct the Accountant-General to have regard to the circumstance that such duty is payable; and where, by any decree or order, any carrying over to a separate account of any fund in respect of which any such duty may be chargeable shall be directed, the registrar shall add the words, "subject to Legacy Duty," to the title of the account. And in order the better to provide security against the payment or transfer by the Accountant-General of any fund chargeable with any such duty without the duty being first paid, the Accountant-General is, on receiving notice from the proper officer that the duty is payable, to cause a memorandum to be made in his books, in conformity with such notice. And the Accountant-General, before executing any decree or order directing the payment or transfer of any fund or part of any fund in respect of which any such duty shall be payable, shall require the production of the official receipt for the duty, or a certificate from the proper officer of the payment of the duty chargeable in respect of any such fund or any portion thereof respectively, by any such decree or order directed to be paid or transferred. And I do further order and direct that where, in making any decree or order, express provision for the payment of any such duty shall be intended to be made, such duty shall, by such decree or order, be directed to be paid to the Receiver-General of Inland Revenue for the time being, or his official assistant duly constituted, to be named in the Order.

Order of 4th March, 1853.

The Right Honourable, &c.

That when any cause shall, at the original or any subsequent hearing thereof, have been adjourned for further consideration, such cause may, after the expiration of eight days, and within fourteen days from the filing of the certificate or report of the chief clerk of the judge to whose court the cause is attached, be set down by the registrar in the cause-book for further consideration, on the written request of the solicitor for the plaintiff or party having the conduct of the cause, and, after the expiration of such fourteen days, the cause may be set down by the registrar on the written request of the solicitor for the plaintiff, or for any other party, and the request to set down the cause may be in the form or to the effect set forth in the schedule hereto marked (A.); but the cause, when so set down, shall not be put into the paper for further consideration, until after the expiration of ten days from the day on

which the same was to set down, and shall be marked in the cause-book accordingly. And notice thereof shall be given to the other parties in the cause, at least six days before the day for which the same may be so marked for further consideration, and such notice may be in the form or to the effect set forth in the schedule hereto marked (B.)

SCHEDULE (A.)

In Chancery—

A. v. B.

I request that this cause, the further consideration whereof was adjourned by the Order of the day of , may be set down for further consideration before His Honour, the
Dated, &c.

C. D.

Solicitor for (the plaintiff.)

SCHEDULE (B.)

In Chancery—

A. v. B.

Take notice that this cause, the further consideration whereof was adjourned by the Order of the day of , was, on the day of , set down for further consideration before His Honour, the for the day of .

Yours, &c.,

C. D.

Solicitor for (the plaintiff.)

To Mr.

Solicitor for (the defendant.)

Order of 12th April, 1853.

The Right Honourable, &c.

That notwithstanding the 27th of the General Orders of the 21st December, 1833, it shall not hereafter be necessary for the registrar, in drawing up any decree or order, to recite any previous decree or order in the cause or matter, or any report, certificate, affidavit, or other document that has been (or before the decree or order is completed shall be) filed or recorded in the court; but it shall be sufficient to refer thereto, save only in matters of contempt, or where the order varies from some general rule, and in such other cases as the court shall direct, or the registrar shall, in his discretion, see fit, the registrar shall

make such short recitals as may be necessary to show the grounds on which the decree or order is granted.

Order of 10th May, 1853.

The Right Honourable, &c.

That, in every case in which any person is entitled to, or in any manner interested in any Old South Sea Annuities, New South Sea Annuities, Bank Annuities, 1726, or Three Pounds per cent. Annuities, 1751, standing in the name of the Accountant-General of this court in trust in any cause or matter, whether such person is so entitled beneficially or only as executor, administrator, trustee, guardian, committee or otherwise, such person may apply to the Master of the Rolls, or to any of the Vice-Chancellors in chambers, by summons in the cause or matter in trust in which such annuities may be standing, praying that the said Accountant-General may be authorized and directed to receive the capital sums, which will, under the provisions of an act passed in the present session of Parliament, intituled "An Act for Redeeming or Commuting the Annuity payable to the South Sea Company, and certain Annuities of Three Pounds per cent. per Annum, and for creating New Annuities of Three Pounds Ten Shillings per cent. per annum, and Two Pounds Ten Shillings per cent. per annum, and issuing Exchequer Bonds," on the 5th of January, 1854, and the 5th of April, 1854, respectively become payable in respect of such annuities, or that the said Accountant-General may be directed to signify, on or before the 3rd day of June next, to the Governor and Company of the Bank of England, or to the South Sea Company, as the case may be, on behalf of all persons interested in such annuities, his assent to accept and receive, in lieu of such Old South Sea Annuities, New South Sea Annuities, Bank Annuities, 1726, or three-pound per cent. annuities, 1751, respectively, a competent portion of new Three-pounds Ten shillings Annuities or Exchequer Bonds, according to the provisions of the said act, and the Master of the Rolls or Vice Chancellors, as the case may be, may on any such application, and on the attendance of such parties, if any, and on such evidence, if any, as he may think fit and require, authorize and direct the said Accountant-General to receive such capital sums, or to signify such assent, as the case may be, in case the said Master of the Rolls or Vice-Chancellors shall be satisfied that such authority and direction may be given with a due regard to the rights of all persons interested in the said funds.

And it is hereby further ordered that the Accountant-General, in all cases in which no notice shall, on or before the 31st day of May, 1853, have been given to him, of an order made by the Master of the Rolls, or one of the Vice-Chancellors, authorizing and directing him to receive such capital sums, or to signify such assent as aforesaid as to any portion of the said annuities so standing in his name, shall, on or before the 3rd day of June next, signify to the Governor and Company of the Bank of England, or to the South Sea Company, as the case may be,

his assent to accept and receive in lieu of the Old South Sea Annuities, New South Sea Annuities, Bank Annuities, 1726, and Three pounds per cent. Annuities, 1751, standing in his name, or of such part thereof as to which no such notice as aforesaid shall have been given to him, a competent sum of Two pounds ten shillings per cent. Annuities according to the provisions of the said act. And the Accountant-General shall in such case, carry such Two pounds ten shillings per cent. Annuities to the credit of the same causes or matters respectively, in respect whereof such assent shall so have been signified by him as aforesaid, and the same shall be held upon the same trusts, and shall be subject to the same orders as the Annuities in respect of which the same shall so be received.

Order of 2nd June, 1853.

The Right Honourable, &c.

That so much of the Order of Court of the 10th day of May, 1853, be revoked as directs that the Accountant-General of this court in all cases in which no notice should, on or before the 31st day of May, 1853, have been given to him of an order made by the Master of the Rolls or one of the Vice-Chancellors, authorizing and directing him to receive such capital sums as thereinbefore referred to, or to signify such assent as therein aforesaid, as to any portion of the Annuities thereinbefore referred to as standing in his name, should, on or before the 3rd day of June then next, signify to the Governor and Company of the Bank of England, or to the South Sea Company, as the case might be, his assent to accept and receive in lieu of the Old South Sea Annuities, New South Sea Annuities, Bank Annuities, 1726, and Three pounds per cent. Annuities, 1751, standing in his name, or of such part thereof, as to which no such notice as therein aforesaid should have been given to him, a competent sum of Two pounds ten shillings per cent. Annuities, according to the provisions of the act therein before mentioned; and that the Accountant-General should in such case carry such Two pounds ten shillings per cent. Annuities to the credit of the same causes or matters respectively, in respect whereof such assent should so have been signified by him as therein aforesaid, and that the same should be held upon the same trusts, and should be subject to the same orders as the Annuities in respect of which the same should so be received.

Order of 3rd June, 1853.

The Right Honourable, &c.

That in all cases in which any order directing the investment from time to time of any interest or dividends accruing upon any stocks or securities standing in the name of the Accountant-General to the credit

of any cause, matter, or account, or upon any stocks or securities which may be ordered to be transferred into the name of the Accountant-General, or to be carried over with his privity from one account to another, or upon any stocks or securities which may be ordered to be purchased with any cash in court, or with any cash to be paid into court with the like privity, shall be brought to the Accountant-General for the purpose of having such direction for investment carried into effect: the said Accountant General may, from time to time, until he shall receive notice of an order to the contrary, without any further request, invest the interest and dividends so directed to be invested, together with all accumulations of interest and dividends thereon, as soon as conveniently may be after they shall accrue due and have been received, in the purchase of the particular description of stock or security named in such order, and place such stocks or securities, when purchased, to the credit of the cause, matter, or account respectively, as may be directed by such order.

Order of 26th July, 1853.

The Right Honourable, &c.

That in the interval between the close of the sittings after any term, and the commencement of the sittings before or at the beginning of the next ensuing term, any judge of the court may sign and adopt any certificate made by the chief clerk of any other judge, and orders made by any judge of the court may be prosecuted at the chambers of any other judge by his permission, and in case the prosecution thereof shall not be completed during such interval, the prosecution may be continued at the chambers of the same judge, if and so far as he shall think fit. In all cases in which any judge signs and adopts a certificate made in pursuance of an order made by any other judge, it is to be expressed that he does so for such other judge, and such certificate shall, in all future proceedings, be deemed to be signed and adopted by the judge for whom it is signed and adopted, save that no application to discharge or vary such certificate is to be made to the judge for whom the same is signed and adopted, without the leave of the judge by whom it has been signed and adopted, and the judge by whom it has been signed and adopted, is to have the same power to discharge or vary the certificate as he would have had if it had been made in pursuance of an order made by himself.

Order of 9th December, 1853.

I, &c.

That any application to the Master of the Rolls or to a Vice-Chancellor, under the "Charitable Trusts Act, 1853," section twenty-eight,

shall be made by summons, and such summons may be in the form set out in Schedule A. annexed to the General Order of the 16th day of October, 1852, or as near thereto as the nature of the case may permit. The fees payable on proceedings before the Master of the Rolls or any of the Vice-Chancellors under the said act, shall be the same as are payable according to the Order of the 23rd day of October, 1852, in respect of other proceedings commencing by summons, and shall be collected by means of stamps, as directed by the Order of the 25th day of October, 1852.

In all cases in which the Master of the Rolls or any Vice-Chancellor shall direct that any matter commenced by summons, under the said act, shall be heard in open court, the same fees shall be payable and the same costs shall be allowed, as would have been payable in respect of any other matter so heard.

No order made under the said act by the Master of the Rolls or by any of the Vice-Chancellors, shall be subject to appeal, where the gross annual income of the charity has not been declared by the Charity Commissioners for England and Wales, to exceed one hundred pounds, unless the Master of the Rolls or the Vice-Chancellor, by whom such order may have been made, shall certify that such appeal ought to be permitted, either absolutely or on such terms as the said Master of the Rolls or Vice-Chancellor may think fit to impose.

Order of 9th March, 1854.

I, The Right Honourable, &c.

That the General Order made by me, bearing date the 31st day of January, 1853, be discharged, and in lieu thereof, I do order that the Registrar, in drawing up any decree or order whereby the Accountant-General shall be directed to pay or transfer any fund or part of any fund in respect of which any duty shall be payable to the revenue, under the acts relating to legacy or succession duty, shall, unless such decree or order expressly provide for the payment of the duty, direct the Accountant-General to have regard to the circumstance that such duty is payable; and where, by any decree or order, any carrying over to a separate account of any fund in respect of which any duty may be chargeable shall be directed, the Registrar shall add to the words "subject to Legacy Duty," or "subject to Succession Duty," as the case may be, to the title of the account; and in order the better to provide security against the payment or transfer by the Accountant-General of any fund chargeable with any such duty, without the duty being first paid, the Accountant-General, on receiving notice from the proper officer that the duty is payable, is to cause a memorandum to be made in his books, in conformity with such notice.

And the Accountant-General, before executing any decree or order, directing the payment or transfer of any fund, or part of any fund, in respect of which any such duty shall be payable, shall require the production of the official receipt for the duty, or a certificate from the

proper officer of the payment of the duty chargeable in respect of any such fund or any portion thereof respectively, by any such decree or order directed to be paid or transferred.

(Signed.)

Order of 1st June, 1854.

That all and every orders, rules, and directions hereinafter set forth, shall henceforth be, and for all purposes be deemed and taken to be, General Orders and Rules of the High Court of Chancery, viz:

I. If the fourteen days, within which, pursuant to the orders of the court, a defendant is bound to file his affidavits in answer to a motion for a decree, or the seven days within which the plaintiff is bound to file his affidavits in reply thereto, or the nine weeks after issue joined, within which the evidence in any cause to be used at the hearing thereof is to be closed, or the month after the expiration of such nine weeks, within which a witness who has made an affidavit intended to be used by any party to such cause at the hearing thereof, is subject to cross-examination, shall expire in the long vacation, the time for the several purposes aforesaid respectively, is hereby extended to the fifth day of the ensuing Michaelmas Term, and is to expire on that day unless enlarged by order: provided always, that in cases where the above mentioned periods of fourteen days and nine weeks respectively, shall be extended by virtue of this order, the seven days within which the plaintiff is bound to file his affidavits in reply, and the month during which a witness is subject to cross-examination shall be respectively taken to commence from the expiration of such extended period.

II. Any judge of the court whose chambers may be open for business during any vacation, may issue summonses for the purpose of any proceeding before the Master of the Rolls or any Vice-Chancellor at chambers after the vacation.

III. The same course of procedure as is now in use, as to the production of documents ordered to be produced before the hearing of a cause, shall extend and be applied to the production of documents ordered to be produced after the hearing of any cause or matter.

IV. In all cases in which the certificate of the chief clerk is to be acted upon by the Accountant-General of the court without any further order, such certificate may be signed and adopted by the judge on the day after the same shall have been signed by the chief clerk, unless any party desiring to take the opinion of the judge thereon, obtains a summons for that purpose before twelve of the clock on that day. And the time for applying to discharge or vary such certificate, when signed and adopted by the judge, is to be two clear days after the filing thereof.

V. In all cases in which any person required to be served with notice of a decree or order pursuant to the 8th rule of the 42nd section of the act 15 & 16 Vict. c. 86, may be an infant, or a person of unsound mind,

not found so by inquisition, the notice is to be served upon such person or persons, and in such manner as the judge to whose court the cause is attached, may direct.

VI. Guardians *ad litem* appointed for infants, or persons of unsound mind, not found so by inquisition, who shall be served with notice of any decree or order, are to be appointed in like manner as guardians *ad litem* to answer and defend, are now appointed in suits on bills filed.

VII. At any time during the proceedings at any judge's chambers, under any decree or order, the judge may, if he shall think fit, require a guardian *ad litem* to be appointed for any infant, or person of unsound mind, not found so by inquisition, who has been served with notice of such decree or order.

VIII. In all cases in which notice of a decree or order shall be served pursuant to the 8th rule of the 42nd section of the act 15 & 16 Vict. c. 86, the notice so served is to be entitled in the cause, and there is to be endorsed thereon a memorandum in the form or to the effect following, that is to say: "Take notice, that from the time of the service of this notice, you (*or as the case may be*, the infant, or person of unsound mind), will be bound by the proceedings in the above cause, in the same manner as if you (*or the said infant, or person of unsound mind*), had been originally made a party to the suit, and that you (*or the said infant, or person of unsound mind*) may, by an order of course, have liberty to attend the proceedings under the within mentioned decree or order; and that you (*or the said infant, or person of unsound mind*) may, within one month after the service of this notice, apply to the court to add to the decree or order.

IX. The charges for copies of pleadings and other proceedings, and documents furnished under the General Orders of 25th October, 1852, Order Number 1, sections 2, 3, and 4, to a person admitted to sue or defend *in formâ pauperis*, or to his solicitor, by or on behalf of any other party, shall be at the rate of one penny-halfpenny per folio: provided always, that if such person shall become entitled to receive divers costs, the charges for such copies shall be at the rate of fourpence per folio, and nothing shall be allowed in taxation in respect of such charges, until such person or his solicitor shall have paid or tendered to the solicitor, or party by whom such copies were furnished, the additional twopence-halfpenny per folio. But this proviso shall not apply to any copy which shall have been furnished by the party himself, who is directed to pay the costs and not by his solicitor.

X. The charges for copies furnished by a person admitted to sue or defend *in formâ pauperis*, other than those furnished by his solicitor, shall be at the rate of one penny-halfpenny per folio.

XI. Expenses incurred in consequence of affidavits being prepared or settled by counsel, are to be allowed only when the Taxing Masters shall, in their discretion, and on consideration of the special circumstances of each case, think such expenses properly incurred; and in such case they are to be at liberty to allow the same or such parts thereof, as they may consider just and reasonable, whether the taxation be between solicitor and client or between party and party.

XII. Any party who may be dissatisfied with the allowance or dis-

allowance by the Taxing Master, in any bill of costs taxed by him, of the whole or any part of any item or items, may, at any time before the certificate is signed, deliver to the other party or parties interested therein, and carry in before the Master, an objection in writing to such allowance or disallowance, specifying therein, by a list in a short and concise form, the items or item, or parts or part thereof objected to, and may thereupon apply to the Master for a warrant to review the taxation in respect of the same.

XIII. Upon the application for such warrant, or upon the return thereof, the Taxing Master is to reconsider and review his taxation upon such objection, and he may, if he shall think fit, receive further evidence in respect thereof; and if so required by either party, he is to state, either in his certificate of taxation, or by reference to such objection, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

XIV. Any party who may be dissatisfied with the certificate of the Taxing Master, as to any item or part of an item which may have been objected to as aforesaid, may apply to the court, by motion or petition, for an order to review the taxation as to the same, and the court may thereupon make such order as to the court shall seem just; but the certificate of the Taxing Master shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

XV. Such motions and petitions are to be heard and determined upon the evidence which shall have been brought in before the Taxing Master, and no further evidence is to be received upon the hearing thereof, unless the court shall otherwise direct.

(Signed.)

Order of 21st June, 1854.

I. From and after the 2nd day of July, 1854, all office copies and other copies of pleadings, proceedings, and documents in the Court of Chancery, shall (except in the cases hereinafter mentioned), be counted and charged for after the rate of seventy-two words per folio, and where such copies or any portion thereof, shall comprise columns containing figures, each figure shall be counted and charged for as one word.

II. From and after the 2nd day of July, 1854, the charge for all transcripts of accounts made in the office of the Accountant-General, shall be after the rate of two shillings for each opening of such transcript, consisting of the debtor and creditor sides of the account to be entered therein.

III. The charges hereinbefore directed to be made, shall be paid by means of stamps, according to the General Orders of the Court of Chancery in that behalf, now in force, so far as relates to documents furnished by the said court.

(Signed.)

Order of 13th January, 1855.

INTRODUCTORY.

I. The course of proceeding prescribed by the 15 & 16 Viet. c. 86, and the General Order of the 7th day of August, 1852, with respect to the mode of examining witnesses, and the practice of the court in relation thereto, are altered in the manner and to the extent prescribed by these orders, but not further or otherwise.

II. The Orders numbered respectively 31, 32, 33, comprised in the General Order of the 7th day of August, 1852, and all other orders and parts of orders, so far as such other orders and parts of orders are inconsistent with these orders, but not further or otherwise, are hereby abrogated and discharged.

III. All former orders and parts of orders not specified in Order II., so far as the same are now in force and consistent with these orders, are to remain in full force and effect.

EVIDENCE.

IV. It shall not be competent for the plaintiff or any defendant to require, by notice or otherwise, that the evidence to be adduced in a cause shall be taken orally, but when issue shall have been joined in any cause, the plaintiff and defendants respectively shall be at liberty to verify their respective cases, either wholly or partially by affidavit, or wholly or partially by the oral examination of witnesses, before one of the examiners of the court, or before an examiner to be specially appointed by the court.

V. The evidence on both sides in any cause to be used at the hearing thereof, whether taken upon affidavit or orally (and including the cross-examination and re-examination by any witness or witnesses), is to be closed within eight weeks after issue joined therein, except that any witness who has made an affidavit intended to be used by any party to such cause at the hearing thereof, shall be subject to cross-examination within one month after the expiration of such period of eight weeks.

VI. No affidavit or deposition filed or made before issue joined in any cause shall, without special leave of the court, be received at the hearing thereof, unless within one month after issue joined, or within such longer time as may be allowed by special leave of the court, notice in writing shall have been given by the party intending to use the same, to the opposite party, of his intention in that behalf.

VII. In suits in which issue shall have been joined when these orders take effect, the evidence to be used at the hearing of the cause shall be taken according to the present practice of the court, unless the parties shall consent, or the court shall order that the same shall be taken in the altered mode prescribed by these orders.

AFFIDAVITS.

VIII. All affidavits, whether to be used at the hearing of a cause, or on any other proceeding before the court, are to state distinctly what facts or circumstances deposed to are within deponent's own know-

ledge, and his means of knowledge, and what facts or circumstances deposed to are known to or believed by him by reason of information, derived from other sources than his own knowledge, and what such sources are.

IX. The costs of affidavits not in conformity with the preceding order, are to be disallowed on taxation, unless the court should otherwise direct.

X. These orders shall be deemed to apply as nearly as may be to evidence taken after the hearing of a cause, as well as to evidence taken previously, and with a view to such hearing,

XI. These orders shall take effect on and after the 21st day of January, 1855.

(Signed.)

Order of 2nd February, 1855.

Where the preparation of any case or matter to lay it before the judge in chambers on a summons, shall have required and received from the solicitor such extraordinary skill and labour, as materially to conduce to the satisfactory and speedy disposal of the business, and therefore shall appear to the judge to deserve higher remuneration than the ordinary fees, the judge may allow to the solicitor, by a memorandum in writing expressly made for that purpose, and signed by the judge, specifying distinctly the grounds of such allowance, such further fee not exceeding ten guineas, as in his discretion he may think fit, instead of the fee of one guinea authorized in such a case by the Order of the 23rd day of October, 1852.

(Signed.)

Order of 30th November, 1855.

I. Every decree, order, report, certificate, petition, and document, made, presented, or used in any cause in this court, is to be distinguished by having plainly written on the first page of such decree, order, report, certificate, petition, and document, the date of the year, the letter and the number by which the cause is distinguished in the Cause books kept by the Clerks of Records and Writs.

II. The Clerks of Records and Writs are, in addition to the entries heretofore made by them in their respective cause-books, to enter therein respectively, the date of every decree, order, report, and certificate, which shall be made in each cause.

III. The entry of every such decree and order is also to contain a reference to the date and folio of the registrar's book in which such decree or order shall have been entered.

IV. These orders are to take effect on and from the 1st day of Hilary Term, 1856, but they are not to apply to any cause commenced before the 1st day of Michaelmas Term, 1852.

(Signed.)

Order of 22nd April, 1850.

The Right Honourable Charles Christopher Lord Cottenham, Lord High Chancellor, &c.

I. Any person seeking equitable relief may, without special leave of the court, and instead of proceeding by bill of complaint in the usual form, file a claim in the Record and Writ Clerk's Office in any of the following cases, that is to say, in any case where the plaintiff is or claims to be,

1. A creditor upon the estate of any deceased person seeking payment of his debt out of the deceased's personal assets.
2. A legatee, under the will of any deceased person, seeking payment or delivery of his legacy out of the deceased's personal assets.
3. A residuary legatee or one of the residuary legatees of any deceased person, seeking an account of the residue and payment or appropriation of his share therein.
4. The person or any of the persons entitled to the personal estate of any person who may have died intestate, and seeking an account of such personal estate, and payment of his share thereof.
5. An executor or administrator of any deceased person seeking to have the personal estate of such deceased person, administered under the directions of the court.
6. A legal or equitable mortgagee or person entitled to a lien as security for a debt, seeking foreclosure or sale, or otherwise to enforce his security.
7. A person entitled to redeem any legal or equitable mortgage, or any lien seeking to redeem the same.
8. A person entitled to the specific performance of an agreement for the sale or purchase of any property, seeking such specific performance.
9. A person entitled to an account of the dealings and transactions of a partnership dissolved or expired, seeking such account.
10. A person entitled to an equitable estate or interest, and seeking to use the name of his trustee in prosecuting an action for his own sole benefit.
11. A person entitled to have a new trustee appointed in a case where there is no power in the instrument, creating the trusts to appoint new trustees or where the power cannot be exercised, and seeking to appoint a new trustee.

II. Such claim in the several cases enumerated in Order I. is to be in the form and to the effect set forth in Schedule A. hereunder written as applicable to the particular case, and the filing of such claim is, in all cases not otherwise provided for, to have the force and effect of filing a bill.

III. Every such claim is to be marked at or near the top or upper part thereof, in the same manner as a bill is now marked with the name of Lord Chancellor and one of the Vice-Chancellors, or with the name of the Master of the Rolls.

IV. Upon filing such claims, the plaintiff thereby claiming may sue out a writ of summons against the defendant to the claim, requiring him to cause an appearance to be entered to such writ, and also requiring him on a day or time, to be therein named, or on the seal or motion day the next following, to show cause, if he can, why such relief as is claimed by the plaintiff should not be had, or why such order, as shall be just with reference to the claim, should not be made.

V. Such writ of summons is to be in the form and to the effect in that behalf set forth in No. 1, of the Schedule B. hereunder written, with such variations as circumstances may require, and is to be sealed with the seal of the office of the Clerks of Records and Writs.

VI. In any case other than those enumerated in Order I. or in any case to which the forms set forth in Schedule A., are not applicable, the court (if it shall so think fit), may, upon the ex parte application of any person seeking equitable relief, and upon reading the claim proposed to be filed, give leave to file such claim, and sue out a writ of summons thereon, under these orders, and if such leave be given, an endorsement thereon, by the Registrar, upon the proposed claim shall be a sufficient authority for the Record and Writ Clerk to receive and file such claim.

VII. In the case provided for by the 5th article of Order I., any one person who, under the 3rd or 4th article of Order I. might have claimed relief against the executor or administrator of the deceased person whose personal estate is sought to be administered, and the co-executor or co-administrator, if any, of the plaintiff may be named in the writ of summons as defendants to the suit, and in the first instance no other person need be therein named.

VIII. In other cases, the only person who need be named in the writ or summons as defendant to the suit in the first instance, is the person against whom the relief is directly claimed.

IX. All claims, and all writs, caveats, proceedings, directions, and orders consequent thereon, either before the court or in the Master's offices, are to be deemed proceedings, writs, and orders subject to the general rules, orders, and practice of the court, so far as the same are or may be applicable to each particular case, and consistent with these orders, and all orders of the court made in such proceedings, are to be enforced in the same manner and by the same process as orders of the court made in a cause upon bill filed.

X. Writs of summons are, as to the number of defendants to be named therein, as to the mode of service thereof, and as to the time and mode of entering appearance thereto, to be subject to the same rules as writs of subpoena to appear to and answer bills.

XI. The time for showing cause named in any writ of summons (except a writ of summons to revive or carry on proceedings), is to be fourteen days at the least after service of the writ, but by consent of the parties, and with the leave of the court, cause may be shown on any earlier day.

XII. At the time for showing cause named in the writ or on the seal or motion day, then next following, or so soon after as the case can be heard, the defendant having previously appeared, is personally or by counsel to show cause in court, if he can (and if necessary by affidavit), why such relief, as is claimed by the claim, should not be had against him.

XIII. At the time appointed for showing cause upon the motion of the plaintiff, and on hearing the claim, and what may be alleged on the part of the defendant, or upon reading a certificate of the appearance being entered by the defendant, or an affidavit of the writ of summons being duly served, the court may, if it shall think fit, make an order granting or refusing the relief claimed, or directing any accounts or inquiries to be taken or made, or other proceedings to be had, for the purpose of ascertaining the plaintiff's title to the relief claimed, and further, the court may direct such (if any) persons or classes of persons as it shall think necessary or fit, to be summoned or ordered to appear as parties to the claim, or on any proceedings before the Master, with reference to any accounts or inquiries directed to be taken or made, or otherwise.

XIV. Every order to be so made is to have the effect of, and may be enforced as a decree or decretal order, made in a suit commenced by bill, and duly prosecuted to a hearing, according to the present course of the court.

XV. If, upon the application for any such order, or during any proceedings under any such order when made, it shall appear to the court that, for the purposes of justice between the parties, it is necessary or expedient that a bill should be filed, the court may direct or authorize such bill to be filed, subject to such terms as to costs or otherwise as may be thought proper.

XVI. The orders made for granting relief in the several cases to which the forms set forth in Schedule A. are applicable, may, if the court thinks fit, be in the form and to the effect set forth in Schedule C. as applicable to the particular case, with such variations as circumstances may require.

XVII. Under every order of reference to the Master, under these orders, the Master is, unless the court otherwise orders, to be at liberty to cause the parties to be examined on interrogatories, and produce deeds, books, papers, and writings, as he shall think fit, and to cause advertisements for creditors, and if he shall think it necessary, but not otherwise, for heirs and next-of-kin, or other unascertained persons, and the representatives of such as may be dead, to be published in the usual forms or otherwise, as the circumstances of the case may require, and in such advertisements to appoint a time within which such persons are to come in and prove their claims, and within which time, unless they so come in, they are to be excluded the benefit of the order, and in taking any account of a deceased's personal estate, under any such order of reference, the Master is to inquire and state to the court what part, if any, of the deceased's personal estate is outstanding or undisposed of, and is also to compute interest on the deceased's debts, as to such of them as carry interest after the rate they respectively carry, and as to all others after the rate of four per cent. per annum from the date

of the order, and to compute interest on legacies after the deceased's death, unless any other time of payment or rate of interest is directed by the will, but in that case, according to the will, and under every order whereby any property is ordered to be sold with the approbation of the Master, the same is to be sold to the best purchaser that can be got for the same, to be allowed by the Master, wherein all proper parties are to join as the Master shall direct.

XVIII. If, upon the proceedings before the Master, under any such order, it shall appear to the Master that some persons, not already parties, ought to attend or to be enabled to attend the proceedings before him, he is to be at liberty to certify the same, and upon the production of such certificate to the Record and Writ Clerk, the plaintiff may sue out a writ of summons requiring the persons named in such certificate to appear to the writ, and such persons are thereupon to be named and treated as defendants to the suit.

XIX. Such writ of summons, under an order or Master's certificate is to be in the form and to the effect in that behalf set forth in No. 2 of Schedule B, with such variations as circumstances may require.

XX. The persons so summoned having appeared, are to be at liberty to attend, and to be entitled to the notice of proceedings before the Master, under the order of reference, subject to such directions as the Master may make in respect thereof.

XXI. Where any proceedings, originally commenced by claim and writ of summons, shall by the death of parties or otherwise, have become abated or defective for want of parties, and no new relief is sought, a claim to revive or carry on the suit, may be filed, and such claim is to be in the form set forth in No. 12 of Schedule A.

XXII. The party claiming simply to revive or carry on proceedings, may sue out a writ of summons requiring the defendant thereto to appear to the writ, and to show cause, if he can, why the proceedings should not be revived or carried on.

XXIII. Such writ of summons is to be in the form and to the effect in that behalf set forth in No. 3 of Schedule B, with such variations as circumstances may require.

XXIV. If any defendant to any such writ is desirous of showing cause why the proceedings should not be revived or carried on, he is to appear and to file a caveat against such revivor, or carrying on in the Record and Writ Clerks' Office in the form set forth in No. 4 of Schedule B, and to give notice thereof in writing to the opposite party. If no such caveat be filed within eight days from the time limited for his appearance to the writ, then at the expiration of such eight days, the proceedings are to be revived, and may be carried on without any order for the purpose, and a certificate of the Record and Writ Clerk, that no caveat has been filed within the time limited, is to be a sufficient authority for the Master to proceed. But if any such caveat be filed, the proceedings are not to be revived or carried on without an order to be obtained on motion, of which due notice is to be given.

XXV. Where any further or supplemental relief is sought, and such supplemental relief is such as is provided for in any of the cases enumerated under Order I., a supplemental claim may be filed, in such of the forms set forth in Schedule A. as is applicable to the case.

XXVI. If such supplemental relief is not such as is provided for by Order XXV., a supplemental claim may be filed, stating shortly the nature of the plaintiff's case, and the supplemental relief claimed, but the leave of the court is to be obtained, previously to the filing thereof, upon an *ex parte* application for the purpose in the manner specified in Order VI.

XXVII. A writ of summons may be sued out, and other proceedings may be taken upon a supplemental claim, in like manner as upon an original claim.

XXVIII. Guardians *ad litem* to defend may be appointed for infants or persons of weak or unsound mind, against whom any writ of summons may have issued under these orders, in like manner as guardians *ad litem* to answer and defend are now appointed in suits on bill filed.

XXIX. Any order or proceeding made, or purporting to be made, in pursuance of these orders may be discharged, varied, or set aside on motion, and any order for accelerating proceedings may be made by consent.

XXX. Any order of the Master of the Rolls or of any of the Vice-Chancellors may be discharged or varied by the Lord Chancellor on motion.

XXXI. If any of the cases enumerated in Order I. involve or are attended by such special circumstances, affecting either the estate or the personal conduct of the defendant, as to require special relief, the plaintiff is at liberty to seek his relief by will, as if these orders had not been made.

XXXII. If, at any time after these orders come into operation, any suit for any of the purposes to which the forms set forth in Schedule A. are applicable shall be commenced by bill and prosecuted to a hearing, and in the usual course, and upon the hearing it shall appear to the court that an order to the effect of the decree then made, or an order equally beneficial to the plaintiff, might have been obtained upon a proceeding by summons, in the manner authorized by these orders, the court may order that the increased costs which have been occasioned by the proceeding by bill, beyond the amount of costs which would have been sustained in the proceeding by summons, shall be borne and paid by the plaintiff.

XXXIII. The Record and Writ Clerks are directed to take the following fees:—

	£	s.	d.
1. For filing a claim	0	5	0
2. For sealing every writ of summons	0	5	0
3. For filing a caveat.....	0	2	6
For appearances, office copies, certificates, &c., the same fees as directed by the schedules of fees now in force.			

The registrars are directed to take the following fees:—

1. For every order on the hearing of a claim, and on further direction.....	2	0	0
2. For every office copy thereof.....	0	10	0
3. For every order on arguing exceptions	1	0	0

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	£	s.	d.
4. For every office copy thereof.....	0	5	0
5. For every order for transfer out of court or sale of any sum of government stock, &c., exceeding 100 <i>l.</i> stock or annuities, and for every order for payment out of court of any annuity or annuities, or of any interest or dividends upon stock or annuities, exceeding in the whole 5 <i>l.</i> per annum.	1	10	0
6. For every office copy thereof.....	0	10	0
For every other order and office copy, the same fees as now received by the registrars and their clerks, under the schedules of fees now in force.			

Solicitors are entitled to charge and be allowed the following fees:—

For instructions to sue or defend	0	6	8
For instructions for every claim.....	0	13	4
For preparing and filing a claim	2	2	0
For preparing a writ of summons	0	13	4
For each writ after the first	0	6	8
For engrossing claims and writs, per folio	0	0	6
For parchment, as paid			
For each copy of writ to serve, per folio.....	0	0	4
For the brief to counsel to move for leave to file claim (exclusive of a copy of the claim for counsel and the court)	0	10	0
For the brief and instructions to counsel on the hearing (exclusive of any necessary copies) ..	1	0	0
For taking instructions to appear, and for entering appearance:—			
For one or more defendants, if not exceeding three	0	13	4
If exceeding three, and not more than six, an additional sum of	0	6	8
If exceeding six, for every number not exceeding three, an additional sum of.....	0	6	8
For settling minutes, passing and entering order on hearing, the same charges as on a decretal order.			
For entering a caveat.....	0	6	8
For procuring certificate of no caveat.....	0	6	8
For term fee, as in suit			

And also all such fees as by the present practice of the court they are entitled to, save such as are varied or rendered unnecessary by these present orders.

XXXIV. These orders shall come into operation on the 22nd day of May, 1850.

XXXV. In these orders and schedules the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction, viz.:—

1. Words importing the singular number include the plural number, and words importing the plural number include the singular number.
2. Words importing the masculine gender include females.
3. The word "affidavit" includes "affirmation," and "declaration on honour."
4. The word person or party includes a body politic or corporate.
5. The word legacy includes an annuity and a specific as well as a pecuniary legacy.
6. The word legatee includes a person interested in a legacy.
7. The expression residuary legatee includes a person interested in the residue.

SCHEDULE (A.)

Form of Claim.

1. By a creditor upon the estate of a deceased person, seeking payment of his debt out of the deceased's personal assets.

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or

[Master of the Rolls.]

Between A. B. plaintiff,
E. F. defendant.

The claim of A. B. of _____, the above-named plaintiff. The said A. B. states that C. D., late of _____, deceased, was, at the time of his death, and that his estate still is justly indebted to him the said A. B. in the sum of £ _____, for goods sold and delivered by the said A. B. to the said C. D. (*or otherwise, as the case may be, or, if the debt is secured by any written instrument, state the date and nature thereof*), and that the said C. D. died in or about the month of _____, and that the above-named defendant E. F. is the executor (or administrator) of the said C. D., and that the said debt hath not been paid, and, therefore, the said A. B. claims to be paid the said debt of £ _____, with his costs of this suit, and in default thereof he claims to have the personal estate of the said C. D. administered in this court, on behalf of himself and all others, the unsatisfied creditors of the said C. D., and for that purpose that all proper directions may be given and accounts taken.

NOTE.—This form may be varied according to the circumstances of the case, where the claimant is not the original creditor, but has become interested in or entitled to the debt, in which case the character in which he claims is to be stated.

2. By a legatee under the will of any deceased person seeking payment or delivery of his legacy out of the testator's personal assets.

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],
or

[Master of the Rolls.]

Between A. B. plaintiff,
C. D. defendant.

The claim of A. B. of _____, the above-named plaintiff. The said A. B. states that he is a legatee to the amount of £ _____, under the will dated the _____ day of _____, of _____, late of _____, deceased, who died on the _____ day of _____, and that the above-named C. D. is the executor of the said _____, and that the said legacy of £ _____ per cent. per annum, from the _____ day of _____, (the day mentioned in the will for the payment of the legacy, or the expiration of twelve calendar months after the said testator's death), is now due and owing to him the said A. B. (or still unpaid or unsatisfied), or unappropriated or unsecured, and the said A. B. therefore claims to be paid (or satisfied) the said legacy and interest (or to have the said legacy and interest appropriated and secured), and, in default thereof, he claims to have the personal estate of the said _____ administered in this court, on behalf of himself and all other the legatees of the said _____, and for that purpose that all proper directions may be given and accounts taken.

NOTE.—This form may be varied according to the circumstances of the case, where the legacy is an annuity or specific, or where the plaintiff is not the legatee, but has become entitled to or interested in the legacy, in which case the character in which the plaintiff claims is to be stated.

3. By a residuary legatee, or any of several residuary legatees, of any deceased person, seeking an account of the residue, and payment or appropriation of his share therein.

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],
or

[Master of the Rolls.]

Between A. B. plaintiff,
C. D. defendant.

The claim of A. B. of _____, the above-named plaintiff. The said A. B. states that he is the residuary legatee (or one of the residuary legatees) under the will dated the _____ day of _____, late of _____, who died on the _____ day of _____, and that the above-named defendant C. D. is the executor of the said _____, and that the said C. D. has not paid to the said A. B. the (or his share of the) residuary personal estate of the said testator, the said A. B. therefore claims to have the personal estate of the said _____ administered in this court,

and to have his costs of this suit, and for that purpose that all proper directions may be given and accounts taken.

NOTE. This form may be varied according to the circumstances of the case, where the plaintiff is not the residuary legatee, but has become entitled to or interested in the residue, in which case the character in which he claims is to be stated.

4. By the person or any of the persons entitled to the personal estate of any person who may have died intestate, and seeking an account of such personal estate, and payment of his share thereof.

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or

[Master of the Rolls.]

Between A. B. plaintiff,
C. D. defendant.

The claim of A. B. of _____, the above-named plaintiff. The said A. B. states that he is next-of-kin (or one of the next-of-kin), according to the statutes for the distribution of the personal estate of intestates of _____, late of _____, who died on the _____ day of _____, intestate, and that the said A. B. is entitled to (or to a share of) the personal estate of the said _____ deceased, and that the said defendant C. D. is the administrator of the personal estate of the said _____, and that the said C. D. has not accounted for or paid to the said A. B. the (or the said A. B.'s share of the) personal estate of the said intestate. The said A. B., therefore claims to have the personal estate of the said administered in this court, and to have his costs of this suit, and for that purpose that all proper directions may be given and accounts taken.

5. By the executor or administrator of a deceased person claiming to have the personal estate of the testator administered under the direction of the court.

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or

[Master of the Rolls.]

Between A. B. plaintiff,
C. D. defendant.

The claim of A. B. of _____. The said A. B. states that he is the executor (or administrator) of E. F., late of _____, but now deceased, who departed this life on or about _____, and that he hath possessed the personal estate of the said E. F. to some amount, and that he is

willing and desirous to account for the same, and that the whole of the personal estate of the said E. F. should be duly administered in this court for the benefit of all persons interested therein or entitled thereto, and that C. D. is interested in the said personal estate, as one of the next-of-kin (or residuary legatee) of the said E. F., and the said A. B. claims to have the personal estate of the said E. F. applied in a due course of administration under the direction of this court, and in the presence of the said C. D., and such other persons interested in the said estate, as this court may be pleased to direct, or that the said C. D. may show good cause to the contrary; and the costs of this suit may be provided for, and for these purposes that all proper directions may be given and accounts taken.

This form may be varied according to circumstances, when the plaintiff's co-executor or co-administrator is a defendant.

6. By a legal or equitable mortgagee or person entitled to a lien as security for a debt, seeking foreclosure or sale or otherwise to enforce his security.

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or

[Master of the Rolls.]

Between A. B. plaintiff,
C. D. defendant.

The claim of A. B. of _____, the above-named plaintiff. The said A. B. states that under or by virtue of an indenture (or other document) dated the _____ day of _____, and made between (parties), and a transfer thereof made by indenture, dated the _____ day of _____, and made between (parties), the said A. B. is a mortgagee (or an equitable mortgagee) of (or is entitled to a lien upon) certain freehold property (or copyhold or leasehold or other property, as the case may be), therein comprised, for securing the sum of £ _____, and interest, and that the time for payment thereof has elapsed, and that the above-named C. D. is entitled to the equity of redemption of the said mortgaged premises (or the premises subject to such lien), and the said A. B. therefore claims to be paid the said sum of £ _____, and interest, and the costs of this suit, and, in default thereof, he claims to foreclose the equity of redemption of the said mortgaged premises (or to have the said mortgaged premises sold, or to have the premises subject to such lien sold, as the case may be), and the produce thereof applied in or towards payment of his said debt and costs, and for that purpose to have all proper directions given and accounts taken.

The names only of the parties are to be set out, not the substance or effect of the document.

If there is no written security to be referred to, the property is to be described generally.

7. By a person entitled to the redemption of any legal or equitable mortgage, or any lien seeking to redeem the same.

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or

[Master of the Rolls.]

Between A. B. plaintiff,

C. D. defendant.

The claim of A. B. of _____, the above-named plaintiff. The said A. B. states that under or by virtue of an indenture (or other document) dated the _____ day of _____, and made between (parties), (and the insurances hereinafter mentioned, that is to say, an indenture dated the _____ day of _____, the will of _____ dated the _____ day of _____). the said A. B. is entitled to the equity of redemption of certain freehold property (or copyhold or leasehold or other property, as the case may be), therein comprised, which was originally mortgaged (or pledged) for securing the sum of £ _____, and interest, and that the above-named defendant C. D. is now by virtue of the said indenture dated the _____ day of _____, (and of subsequent assurances), the mortgagee of the said property (or holder of the said lien), and entitled to the principal money and interest remaining due upon the said mortgage (or lien), and he believes that the amount of principal money and interest now due upon the said mortgage (or lien), is the sum of £ _____, or thereabouts, and that the said A. B. hath made, or caused to be made, an application to the said C. D., to receive the said sum of £ _____, and any costs justly payable to him, and to re-convey to the said A. B. the said mortgaged property (or property subject to the said lien) upon payment thereof, and of any costs due to him in respect of the said security, but that the said C. D. has not so done, and therefore the said A. B. claims to be entitled to redeem the said mortgaged property (or property subject to the said lien), and to have the same re-conveyed (or delivered up) to him upon payment of the principal money and interest and costs due and owing upon the said mortgage (or lien), and for that purpose, to have all proper directions given and accounts taken.

8. By a person entitled to the specific performance of an agreement for the sale or purchase of any property seeking such specific performance.

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or

[Master of the Rolls.]

Between A. B. plaintiff,

C. D. defendant.

The claim of A. B. of _____, the above-named plaintiff. The said

A. B. states that by an agreement dated the day of , and signed by the above-named defendant C. D., he the said C. D. contracted to buy of him (or sell to him) certain freehold property (or copyhold, leasehold, or other property, as the case may be), therein described or referred to, for the sum of £ , and that he has made or caused to be made, an application to the said C. D. specifically to perform the said agreement on his part, but that he has not done so, and the said A. B. therefore claims to be entitled to a specific performance of the said agreement, and to have his costs of this suit, and for that purpose to have all proper directions given: and he hereby offers specifically to perform the same on his part.

9. By a person entitled to an account of the dealings and transactions of a partnership dissolved or expired, seeking such account.

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],
or

[Master of the Rolls.]

Between A. B. plaintiff.

C. D. defendant.

The claim of A. B. of , the above-named plaintiff. The said A. B. states that from the day of , down to the day of , he and the above-named C. D. carried on the business of , in co-partnership under certain articles of co-partnership dated the day of , and made between (parties), (or without articles, as the case may be), and he saith that the said partnership was dissolved (or expired, as the case may be), on the day of , and he claims an account of the partnership dealings and transactions between him and the said C. D., and to have the affairs and business of the said partnership wound up, and settled under the direction of this court, and for that purpose, that all proper directions may be given and accounts taken.

10. By a person entitled to an equitable estate or interest, and claiming to use the name of his trustee in prosecuting an action for his own sole benefit.

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],
or

[Master of the Rolls.]

Between A. B. plaintiff,

C. D. defendant.

The claim of A. B. of , the above-named plaintiff. The said A. B. states that under an indenture dated the day of , and

made between (parties), he is entitled to an equitable estate or interest in certain property therein described or referred to, and that the above-named defendant is a trustee for him of such property, and that being desirous to prosecute an action at law against _____, in respect of such property, he has made or caused to be made an application to the said defendant to allow him to bring such action in his name, and has offered to indemnify him against the costs of such action, but that the said defendant has refused or neglected to allow his name to be used for that purpose, and the said A. B. therefore claims to be allowed to prosecute the said action in the name of the said defendant, and hereby offers to indemnify him against the costs of such action.

11. By a person entitled to have a new trustee appointed in a case when there is no power in the instrument creating the trust to appoint new trustees, or when the power cannot be exercised, and seeking to appoint a new trustee.

In Chancery—

[Lord Chancellor],
 [Vice-Chancellor of England, or Vice-Chancellor naming him],
 or
 [Master of the Rolls.]

Between A. B. plaintiff,
 C. D. defendant.

The claim of A. B. of _____, the above-named plaintiff. The said A. B. states that under an indenture dated the _____ day of _____, and made between (parties) (or will of _____, or other document, as the case may be), he the said A. B. is interested in certain trust property therein mentioned or referred to, and that the above-named defendant C. D. is the present trustee of such property (or is the real or personal representative of the last surviving trustee of such property, as the case may be), and that there is no power in the said indenture (or will, or other document) to appoint new trustees (or that the power in the said indenture (or other document) to appoint new trustees, cannot be executed), and the said A. B. therefore claims to have new trustees appointed of the said trust property, in the place of (or to act in conjunction with) the said C. D.

12. By a party entitled to revive or to carry on a suit, and seeking to revive or carry on the suit.

In Chancery—

As in
 original
 claim. { [Lord Chancellor],
 [Vice-Chancellor of England, or Vice-Chancellor, naming
 him],
 or
 [Master of the Rolls.]

Title of this claim.	{	Between A. B. plaintiff,	
		and	
		C. D. defendant;	
		and	
		{	Between G. H. plaintiff,
			and
			K. L. defendant.

The claim of G. H. of _____, the above-named plaintiff. The said G. H. states that the said A. B. filed his claim in this suit on or about _____, that on or about _____, the said A. B. died (or became bankrupt or insolvent), that the said suit and all proceedings thereunder have thereby become abated (or defective), that the said G. H. has become and is the executor (or administrator, or the assignee of the estate and effects) of the said A. B. and he claims to be entitled to revive the said suit and proceedings (or be entitled to carry on the said suit and proceedings), and to have all such relief as the said A. B. would have been entitled to, if he had lived (or had not become bankrupt or insolvent), or that the said C. D. ought to show good cause to the contrary.

NOTE.—This form may be applied to any case to which Order XXI. applies, and may be varied according to the circumstances of each case.

SCHEDULE (B.) No. 1.

Form of Writ of Summons on Claim.

Victoria by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith to C. D., greeting—
Whereas A. B. hath caused to be filed with the Record and Writ Clerks of Our High Court of Chancery, a claim as follows :—(*claim to be set forth verbatim*), therefore We command you (and every of you where there is more than one defendant), that within eight days after the service of this writ on you, exclusive of the day of such service, laying all excuses and other matters aside, you do cause an appearance to this writ to be entered for you in Our High Court of Chancery, and further that on the fourteenth day after the service of this writ, or on the seal or motion day then next following, you do personally or by your counsel appear in the Court of Our Lord Chancellor, before the Vice-Chancellor of England (or the Vice-Chancellor naming him), (or in the Court of Our Master of the Rolls), at ten of the clock in the forenoon, and then and there show cause, if you can, why the said A. B. should not have such relief against you, as is claimed by the said claim, or why such order, as shall be just with reference to the claim, should not be made, and hereof fail not at your peril.

Witness Ourselves, at Westminster, the _____ day of _____, in the _____ year of Our reign.

(*The following memorandum to be placed at the foot*):

Appearance to be entered at the Record and Writ Clerk's Office, in

Chancery Lane, London, and if you neglect to enter your appearance, and either personally or by your counsel to appear in the High Court of Chancery, at the place and on the day and hour above-mentioned, you will be subject to such order as the court may think fit to make against you in your absence, for payment or satisfaction of the said claim, or as the nature and circumstances of the case may require.

SCHEDULE (B.) No. 2.

Victoria, &c., to , greeting.

Whereas A. B. hath caused to be filed a claim against D., claiming, &c., (*set forth only the claim without the introductory statement.*) And whereas by an order made in the said cause, dated the day of , it was ordered .

And whereas Mr. , the Master to whom the said order stands referred, hath, by his certificate dated the day of , certified to us that you ought to be a party to the said cause, and to be served with a writ of summons therein, therefore, We command you that within eight days after the service of this writ on you, exclusive of the day of such service, you do cause an appearance to be entered for you in Our High Court of Chancery, and that you do attend the proceedings in the said cause as a party defendant thereto, and do and observe such things as are by our said court ordered and directed in the said cause, and herein fail not. Witness, &c.

(*The following memorandum to be placed at the foot*):

Appearance to be entered at the Record and Writ Clerk's Office, Chancery Lane, London, and if you neglect to appear, the proceedings will be carried on without further notice to you.

SCHEDULE (B.) No. 3.

Victoria, &c., to , greeting.

Whereas A. B. hath caused to be filed a claim against C. D., claiming, &c., (*set forth the claim verbatim.*)

And whereas the said A. B. hath departed his life (or become bankrupt), (or as the case may be), whereby the said suit hath become abated (or defective), and G. H. is now the legal personal representative (or assignee, of the said A. B., and as such claims to be entitled to revive (or carry on) the said suit, therefore, We command you the said C. D., that, within eight days after the service of this writ on you, exclusive of the day of such service, you do cause an appearance to be entered for you in Our High Court of Chancery, and further that, within sixteen days after such service, you do show good cause, if you can, why the suit and all proceedings thereunder should not be revived against you, and be in the same plight and condition as the same were in at the time of the said abatement thereof (or why the suit and proceedings should not be carried on against you as claimed.) Witness, &c.

(*The following memorandum to be placed at the foot*):

Appearance to be entered at the Record and Writ Clerk's Office, in

Chancery Lane, London; and, if you desire to show cause, you are to enter a caveat at the same office, within the time limited, otherwise the suit will stand revived, or may be carried on without further order.

SCHEDULE (B.) No. 4.

Form of a Caveat against Revivor.

Between A. B., plaintiff,
C. D., defendant.
And between G. H., plaintiff.
K. L., defendant.

The said K. L. objects to the suit in the plaintiff's claim mentioned being revived (or carried on) against him, in the manner claimed by the plaintiff.

SCHEDULE (C.)

1. *Form of Order for payment of a debt or legacy.*

In Chancery—

[Lord Chancellor],
[Vice-Chancellor of England, or Vice-Chancellor naming him],
or
[Master of the Rolls.]

Date

Between A. B., plaintiff,
C. D., defendant,

Upon motion this day, made unto this court by Mr. , of counsel for the plaintiff, and, upon hearing, by Mr. , of counsel for the defendant (or upon reading a certificate of an appearance having been entered by the defendant), (or upon hearing an affidavit of service upon the defendant of a writ of summons issued in this cause), and upon reading the claim filed in this cause on the day of , (and an affidavit of , filed in this cause), (or the defendant by his counsel admitting assets of the testator or intestate in the said claim named), this court doth order that the defendant do, within a month after service upon him of this order, pay to the plaintiff the sum of £ , together with interest thereon, at the rate of £ , per cent. per annum, from the day of , to the time of such payment, together with the costs of this suit, to be taxed by the Taxing Master in rotation.

2. *Form of Order on Executor or Administrator to account on claim by a Creditor or Testator, or Intestate.*

In Chancery—

[Lord Chancellor],
[Vice-Chancellor of England, or Vice-Chancellor, naming him],
or
[Master of the Rolls.]

Date

Between A. B., plaintiff,
C. D., defendant.

Upon motion, &c. (*as in Form No. 1*), this court doth declare that all persons who are creditors of the said testator or intestate, are entitled to the benefit of this order, and it is ordered that it be referred to the Master of this court in rotation, to take an account of what is due to the plaintiff and all other the creditors of deceased the testator (or intestate), in the plaintiff's claim named, and of his funeral expenses: and it is ordered that the Master do take an account of the personal estate of the said testator (or intestate) come to the hands of the said defendant, his executor (or administrator), or to the hands of any other person or persons by his order or for his use: and it is ordered that the said testator's or (intestate's) personal estate be applied in payment of his debts and funeral expenses in a due course of administration, and this court doth reserve the consideration of all further directions, and of the costs of this suit until after the said master shall have made his report.

3. *Form of Order to Account on Claim by a Legatee.*

In Chancery—

[Lord Chancellor].

[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or

[Master of the Rolls.]

Date.

Between A. B., a legatee of deceased, plaintiff,
C. D. defendant.

Upon motion, &c. (*as in Form No. 1*), this court doth declare that all persons who are legatees of the said testator, are entitled to the benefit of this order: and it is ordered that it be referred to the Master of this court in rotation, to take an account of the personal estate, not specifically bequeathed, of deceased, the testator in the plaintiff's claim named, come to the hands of the defendant, or to the hands of any other person or persons by his order or for his use: and it is ordered that the said Master do take an account of the said testator's debts, funeral expenses, and of the legacies given by his will: and it is ordered that the said testator's said personal estate be applied in payment of his funeral expenses and debts, in due course of administration, and then in payment of his legacies. And this court doth reserve the consideration of all further directions and of the costs of this suit, until after the said Master shall have made report.

4. *Form of Order to Account on Claim by a Residuary Legatee, or one of several Residuary Legatees.*

In Chancery—

[Lord Chancellor],
[Vice-Chancellor of England, or Vice-Chancellor, naming him],
or
[Master of the Rolls.]

Date.

Between A. B., a residuary legatee of deceased, plaintiff,
C. D. defendant.

Upon motion, &c. (*as in Form No. 1*), this court doth declare that all the residuary legatees named or described in the will of , deceased, the testator named in the plaintiff's claim, are entitled to the benefit of this order, and to attend the proceedings under the same before the Master, to inquire and state to the court who were the residuary legatees of the testator living at the time of his death, and whether any of them are since dead, and, if dead, who is or are their legal personal representative or representatives, and if the Master shall find that all such residuary legatees, or their legal personal representatives, have been duly served with writs of summons, he is to proceed to take an account, &c. (*as in No. 3, to the end.*)

5. *Form of Order to Account on Claim by the Next-of-kin or one of the Next-of-kin of an Intestate.*

In Chancery—

[Lord Chancellor],
[Vice-Chancellor of England, or Vice-Chancellor, naming him],
or
[Master of the Rolls.]

Date.

Between A. B., plaintiff,
C. D., defendant.

Upon motion, &c. (*as in Form No. 1*), this court doth declare that all the next-of-kin, according to the Statutes of Distribution of , the intestate named in the plaintiff's claim, are entitled to the benefit of this order, and to attend the proceedings before the Master under the same, and it is referred to the Master of this court in rotation, to inquire and state to the court, who were the next-of-kin according to the Statutes of Distribution of the said , living at the time of his decease, and whether any of them are since dead, and, if dead, who is or are their legal personal representative or representatives, and if the said Master shall find that such next-of-kin have been duly served with writs of summons to attend the proceedings before him under this order, then it is ordered that it be referred to the said Master to take an account of the said intestate's personal estate (usual accounts of personal estate, debts, and funeral expenses, &c., *as in Form No. 3.*)

6. *Form of Order for Accounts of Personal Estate of a Deceased Person, on the Claim of the Executor or Administrator.*

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],
or

[Master of the Rolls.]

Date.

Between A. B., plaintiff,
C. D., defendant.

Upon motion, &c. (*as in Form No. 1*), this court doth declare that all persons interested in the personal estate of the said testator (*or* intestate) are entitled to the benefit of this order, and it is ordered that it be referred to the Master, to take an account of the testator's (*or* intestate's) personal estate possessed by the plaintiff or by any other person, by his order or for his use, and also to take an account of the testator's (*or* intestate's) funeral expenses, debts, and legacies, and it is ordered that such personal estate be applied in a due course of administration, in payment of such funeral expenses, debts, and legacies, and any further directions which may be necessary are hereby reserved, &c.

7. *Form of Order of Foreclosure on Claims by a legal or equitable Mortgagee.*

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],
or

[Master of the Rolls.]

Date

Between A. B., plaintiff,
C. D., defendant.

Upon motion, &c. (*as in Form No. 1*), this court doth order that it be referred to the Master of this court in rotation, to take an account of what is due to the plaintiff for principal and interest on the mortgage (*or* equitable mortgage), in the plaintiff's claim mentioned: and it is ordered that it be referred to the Taxing Master in rotation, to tax the plaintiff his costs of this suit: and upon the defendant paying to the plaintiff what shall be reported due to him for principal and interest as aforesaid, together with the said costs, when taxed, within six months after the said Master shall have made his report, at such time and place as the said Master shall appoint, it is ordered that the plaintiff (do reconvey the mortgaged premises in the plaintiff's affidavit of claim mentioned, free and clear of all incumbrances done by him or any claiming by, for, or under him, and) do deliver up all deeds and writings in his custody or power relating thereto upon oath, to the said defen-

dant, or to whom he shall appoint, but in default of the defendant paying unto the plaintiff such principal, interest, and costs as aforesaid, by the time aforesaid, it is ordered that the defendant (do stand absolutely debarred, and foreclosed of and from all equity of redemption of, in, and to the said mortgaged premises) do convey to the plaintiff the premises comprised in the equitable mortgage in the plaintiff's affidavit of claim mentioned, free and clear of all right, title, interest, and equity of redemption of, in, and to the said premises, and the Master is to settle the conveyance if the parties differ about the same.

8. *Form of Order of Sale on Claim by a legal or equitable Mortgagee or Person entitled to a Lien.*

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],
or

[Master of the Rolls.]

Date.

Between A. B., plaintiff.

C. D., defendant.

Upon motion, &c. (*as in Form No. 1*), this court doth order that it be referred to the Master of this court in rotation, to take an account of what is due to the plaintiff for principal and interest on the mortgage (or equitable mortgage or lien), in the plaintiff's claim mentioned: and it is ordered that it be referred to the Taxing Master in rotation, to tax the plaintiff his costs of this suit: and upon the defendant paying to the plaintiff what shall be reported due to him, for principal and interest as aforesaid, together with the said costs, within six months after the said Master shall have made his report, at such time and place as the said Master shall appoint, it is ordered that the plaintiff (do reconvey the mortgaged premises in the plaintiff's affidavit of claim mentioned, free and clear of all incumbrances done by him, or any claiming by, from, or under him, and) do deliver up all deeds and writings in his custody or power relating thereto, upon oath to the defendant, or to whom he shall appoint, but in default of the defendant paying to the plaintiff such principal, interest, and costs as aforesaid, by the time aforesaid, then it is ordered that the said mortgaged premises (or the premises subject to the said equitable mortgage or lien), be sold with the approbation of the said Master: and it is ordered that the money to arise by such sale be paid into court to the end that the same may be duly applied in payment of what shall be found due to the plaintiff for principal, interest, and costs as aforesaid, and this court doth reserve the consideration of all further directions until after the said Master shall have made his report.

9. *Form of an Order for Redemption on Claim by Person entitled to redeem.*

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or

[Master of the Rolls.]

Date.

Between A. B., plaintiff,

C. D., defendant.

Upon motion, &c. (*as in Form No. 1*), this court doth order that it be referred to the Master in rotation, to take an account of what is due to the defendant, for principal and interest on his mortgage (or equitable mortgage or lien), in the plaintiff's claim mentioned: and it is ordered that it be referred to the Taxing Master in rotation, to tax the defendant his costs of this suit: and upon the plaintiff paying to the defendant what shall be reported due to him for principal and interest, together with such costs, when taxed, within six months after the said Master shall have made his report, at such time and place as the said Master shall appoint, this court doth order that the defendant do reconvey the mortgaged premises (or deliver up possession of the property subject to the equitable mortgage or lien), in the plaintiff's claim mentioned, free and clear from all incumbrances done by him, or any claiming by, from, or under him, and to deliver up all deeds and writings in his custody or power relating thereto, upon oath to the plaintiff, or to whom he shall appoint, but, in default thereof, the plaintiff's said claim is to stand dismissed out of this court, with costs to be taxed by the said Taxing Master, and to be paid by the plaintiff to the defendant.

10. *Form of Order of Reference of Title on Claim of Person seeking specific performance.*

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or

[Master of the Rolls.]

Date.

Between A. B., plaintiff,

C. D., defendant.

Upon motion, &c. (*as in Form No. 1*), this court doth order that it be referred to the Master of this court in rotation, to inquire whether a good title can be made to the property comprised in the agreement in the said plaintiff's claim mentioned, and in case the said Master shall be of opinion that a good title can be made, it is ordered that he do state at what time it was first shown that such good title could be made, and this court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said Master shall have made his report.

11. *Form of Order for an Account of Partnership Dealings and Transactions on Claim of Person entitled to the Account.*

In Chancery—

[Lord Chancellor],
[Vice-Chancellor of England, or Vice-Chancellor, naming him],
or
[Master of the Rolls.]

Date.

Between A. B., plaintiff,
C. D., defendant.

Upon motion, &c. (*as in Form No. 1*), this court doth order that it be referred to the Master of this court in rotation, to take an account of the partnership dealings and transactions between the plaintiff and the defendant, from the day of : and it is ordered that what upon taking the said account shall be found due from either of the said parties to the other of them, be paid by the party from whom the same shall be found due, (and this court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said Master shall have made his report.)

12. *Form of an Order on Claim by a Person claiming to use the Name of his Trustee.*

In Chancery—

[Lord Chancellor],
[Vice-Chancellor of England, or Vice-Chancellor, naming him],
or
[Master of the Rolls.]

Date.

Between A. B., plaintiff,
C. D., defendant,

Upon motion, &c. (*as in Form No. 1*), this court doth order that the plaintiff be at liberty to use the name of the defendant in prosecuting the action at law, in the plaintiff's claim mentioned, on indemnifying the defendant against the costs of such action: and it is ordered that it be referred to the Master of this court in rotation, to settle the indemnity to be given by the plaintiff to the defendant, in case the parties differ about the same.

13. *Form of Order on Claim for the Appointment of New Trustees.*

In Chancery—

[Lord Chancellor],

[Vice-Chancellor of England, or Vice-Chancellor, naming him],

or

[Master of the Rolls.]

Date.

Between A. B., plaintiff,

C. D., defendant.

Upon motion, &c. (as in *Form No. 1*), this court doth order that it be referred to the Master of this court in rotation, to appoint proper persons to be new trustees under the indenture (or will, or other instrument), in the plaintiff's claim mentioned, in the place of (or to act in conjunction with) the defendant: and it is ordered that the defendant do convey (assign or transfer) the trust fund or property (*referring to it*) to such new trustees (or so as to vest the same in such new trustees jointly with himself) upon the trusts of the said indenture (or will, or other document) or such of them as are now subsisting, and capable of taking effect, and they are to declare the trusts thereof accordingly, such conveyance (or assignment) to be settled by the said Master [in case the parties differ about the same:] ⁽¹⁾ (and it is ordered that the defendant do deliver over to such new trustees all deeds and writings in his custody or power, relating to the said trust property.) ⁽²⁾

⁽¹⁾ To be omitted in the case of infants or charities.

⁽²⁾ To be omitted where the defendant is continued a trustee.

NOTE.

Since these pages were printed, the question of costs in a mortgagee's suit has been decided in a manner which makes it unsafe to rely upon the case of *White v. Bishop of Peterborough* (*ante*, p. 201), unless in a case on every point similar. *Ford v. Chesterfield* (M.R. 23rd Feb. 1856). was a suit by an equitable mortgagee against the mortgagor and prior and subsequent incumbrancers; the mortgaged property was sold under a contract entered into before the suit, and the money came into court. The decree directed in the usual manner an inquiry what incumbrancers there were, and their priorities. *White v. Bishop of Peterborough* was relied upon in argument, to show that the costs of all the incumbrancers must, in the first instance, be paid out of the fund; but the court held that the case cited did not apply, and that the plaintiff's costs being paid out of the fund, all the other incumbrancers must take their debts, interest, and costs in the order of their priorities.

APPENDIX II.

GENERAL ORDERS.

Monday the 2nd day of February, 1857.

The Right Hon. Robert Monsey, Lord Cranworth, Lord High Chancellor of Great Britain, by and with the advice and consent of the Right Hon. Sir John Romilly, Master of the Rolls, the Right Hon. Sir James Lewis Knight Bruce, and the Right Hon. Sir George James Turner, the Lords Justices of the Court of Appeal in Chancery, the Hon. the Vice-Chancellor Sir Richard Torin Kindersley, the Hon. the Vice-Chancellor Sir John Stuart, and the Hon. the Vice-Chancellor Sir William Page Wood, doth hereby, in pursuance of the Act passed in the session of Parliament holden in the fifth and sixth years of the reign of her present Majesty, intituled "An Act for Abolishing certain Offices in the High Court of Chancery in England," and in pursuance and execution of all other powers enabling him in that behalf, order and direct,—

That in lieu of the order numbered 22, comprised in the General Order of the 26th day of October, 1842, the following order be substituted, (that is to say)—

Service of all writs, notices, summonses, orders, warrants, rules, documents, and other proceedings, not requiring personal service upon the party to be affected thereby, shall be made before seven o'clock in the evening, except on Saturdays, when it shall be made before two o'clock in the afternoon, and if made after seven o'clock in the evening, on any day except Saturdays, the service shall be deemed as made on the following day, and if made after two o'clock in the afternoon on Saturday, the service shall be deemed as made on the following Monday.

[CH.]

2 H*

This order is to come into operation on the 10th day of February 1857.

CRANWORTH, C.
JOHN ROMILLY, M.R.
J. L. KNIGHT BRUCE, L.J.
G. J. TURNER, L.J.
RICHARD T. KINDERSLEY, V.C.
JOHN STUART, V.C.
W. P. Wood, V.C.

Friday, the 30th day of January 1857.

Whereas of late years various alterations have taken place in the practice and procedure of the Court of Chancery, whereby certain of the fees heretofore allowed to the solicitors of the court have ceased, and others of such fees have become inapplicable to the duties which the solicitors have to perform; and it is desirable that a new and revised list of fees should be made.

Now, upon consideration thereof,

The Right Honourable Robert Monsey, Lord Cranworth, Lord High Chancellor of Great Britain, with the advice and assistance of the Right Honourable Sir James Lewis Knight Bruce, and the Right Honourable Sir George James Turner, the Lords Justices of the Court of Appeal in Chancery, the Honourable the Vice-Chancellor Sir Richard Torin Kindersley, the Honourable the Vice-Chancellor Sir John Stuart, and the Honourable the Vice-Chancellor Sir William Page Wood, doth order and direct as follows:—

1. The several orders and parts of orders following are discharged, so far as regards all costs incurred subsequent to the time when this order comes into operation;

The order of the 26th day of February 1807, except so much thereof as is mentioned in the second schedule hereto.

The sixth schedule to the order of the 26th October 1842.

The 121st section of the order of the 8th May 1845.

So much of the thirty-third section of the order of the 22nd April 1850 as relates to the fees to be charged by and allowed to solicitors.

The fourth section of the order of the 7th August 1852, and the schedule A. appended to such order.

The fifth section of the order of the 23rd October 1852.

2. Solicitors are to be entitled to charge and be allowed the fees set forth in the column headed Lower Scale in the first schedule hereto, in the several cases following, unless the court shall make order to the contrary: that is to say,—

- 1st. In all suits by creditors, legatees (whether specific, pecuniary, or residuary), devisees (whether in trust or otherwise), heirs at law or next of kin, in which the personal or real, or personal and real estate, for or against or in respect of which, or for an account or administration of which, the demand may be made, shall be under the amount or value of 1000*l*.
- 2ndly. In all suits for the execution of trusts in which the trust estate or fund shall be under the amount or value of 1000*l*.
- 3rdly. In all suits for foreclosure or redemption, or for enforcing any charge or lien, in which the mortgage whereon the suit is founded, or the charge in lien sought to be enforced, shall be under the amount or value of 1000*l*.
- 4thly. In all suits for specific performance, in which the purchase-money or consideration shall be under the amount or value of 1000*l*.
- 5thly. In all proceedings under the Trustees Relief Acts, or under the Trustee Acts, or under any of such Acts, in which the trust estate or fund to which the proceeding relates shall be under the amount or value of 1000*l*.
- 6thly. In all proceedings relating to the guardianship or maintenance of infants, in which the property of the infant shall be under the amount or value of 1000*l*.
- 7thly. In all proceedings by special case, and in all proceedings relating to funds carried to separate accounts, and in all proceedings under any railway or private Act of Parliament, or under any other statutory or summary jurisdiction, and generally in all other cases where the estate or fund to be dealt with shall be under the amount or value of 1000*l*.

3. In all other cases solicitors are to be entitled to charge and be allowed the fees set forth in the column headed Higher Scale in the first schedule hereto, unless the court shall make order to the contrary as to all or any of the parties.

4. The fees of court, now collected by means of stamps, are to be reduced and varied as set forth in the third schedule hereto.

The fees set forth in the column headed Lower Scale in the third schedule hereto are to be paid in all cases in which the lower scale of fees is to be charged by and allowed to solicitors, under the provisions of the second section of this order; and the fees of court set forth in the column headed Higher Scale in the third schedule hereto are to be paid in all other cases.

The solicitor or party instituting any proceeding in respect of which he claims to pay the fees of court according to the lower scale, is to file with the clerk of records and writs a certificate in the form hereunder set forth, of which certificate the clerk of records and writs is, at the request of any solicitor, or any party acting in person, in the suit or matter, to mark a copy.

On production of such copy of the certificate, the officers of the court are to receive and file all proceedings in the suit or matter bearing stamps according to the lower scale.

In any case certified for the lower scale of court fees in which it shall happen that the solicitor shall become entitled to charge and be allowed according to the higher scale of solicitors' fees, the deficiency in the fees of court is to be made good.

In any case in which the fees of court have been paid upon the higher scale, and in which it shall happen that the solicitor shall become entitled to charge and be allowed only according to the lower scale of solicitors' fees, the excess of fees of court so paid may be allowed upon the taxation of costs, if the circumstances of the case shall, in the judgment of the taxing master, justify such allowance.

This order is to come into operation on the 1st Feb. 1857.

Form of Certificate for paying the Lower Scale of Court Fees.

(Title of Cause or Matter.)

I hereby certify, that to the best of my judgment and belief, the lower scale of fees of court is applicable to this case. Dated, &c.

A.B.

Solicitor for

THE FIRST SCHEDULE.

Schedule of Fees and Charges to be allowed to Solicitors.

INSTRUCTIONS.

	Lower Scale.			Higher Scale.		
For claims, original summons in chambers, special cases, answers, examinations, de- murrers, pleas, and excep- tions	£0	13	4	£0	13	4
For bills	0	13	4	2	2	8
For amended or supplemental bill	0	6	8	0	13	4
For brief on moving for in- junction	0	13	4	1	1	0
For interrogatories for exami- nation of parties or witnesses	0	6	8	0	13	4
For special petitions	0	6	8	0	13	4
For special affidavits	0	6	8	0	6	8
For brief in a suit by bill, on cause coming on for hearing, to be charged on service of notice of motion for a decree or on service of subpoena to hear judgment	1	1	0	1	1	0
For brief on claim, to include all observations	0	10	0	1	0	0
For ditto to move for leave to file	0	2	6	0	10	0
To defend proceedings com- menced by bill, claim, special case, petition, or original summons	0	6	8	0	13	4
For instructions for order to revive or add parties	0	6	8	0	13	4

As to bills and answers, examina-
tions, affidavits, and petitions,
when the larger scale is applic-
able, in lieu of the fixed fees for
instructions for and for drawing,
the taxing master is to be at
liberty to take into his conside-
ration the special circumstances
of each case, and at his discretion
to make such allowances for
work, labour, and expenses pro-
perly performed and incurred in

or about the preparation of the bill or answer, examination, affidavit, or petition, as shall appear to him to be just, having regard to the length of the document, the nature of the suit, the interests of the parties, and the fund or person from which or by whom the costs are to be paid.

THE PREPARATION OF PLEADINGS AND OTHER DOCUMENTS.

(The Chancery folio to be seventy-two words and the sheet ten folios.)

For drawing bills, special cases, answers, pleas, demurrers, exceptions, interrogatories, petitions, and affidavits, per folio	£0	1	0	£0	1	0
For engrossing on parchment, per folio	0	0	6	0	0	6
For ditto on paper	0	0	4	0	0	4
For drawing statements and other documents for the judge's or master's chambers, when required, including the fair copy thereof to leave in chambers	0	0	8			
For the like drawing when the larger scale is applicable ...				0	1	0
For fair copy thereof to be left in chambers				0	0	4
For drawing all advertisements to be signed by the master or judge's clerk, including the attendance thereon	0	6	8	0	13	4
For drawing request to the Accountant-General to lay out cash	0	2	6	0	2	6
For ditto for every carrying over of cash or stock	0	2	6	0	2	6
For drawing <i>caveat</i> against signing or enrolling any decree or order	0	2	6	0	2	6
For drawing special notice of motion	0	2	0	0	5	0
Or per folio	0	0	0	0	1	0

For drawing a claim	£1	1	0	£2	2	0
For ditto at the master's discretion				3	3	0
For drawing such observations for counsel to accompany brief (except on claims) as may be necessary and proper, per sheet				0	6	8
For drawing the brief on further consideration, per sheet ...	0	6	8	0	6	8
For preparing and filing replication	0	6	8	0	10	0
For drawing statement on which counsel to move for order to revive or add parties, and copy	0	6	8	0	10	0
Or, according to circumstances, at per sheet				0	6	8
For drawing petition to revive, at per folio	0	1	0	0	1	0
For drawing and copying certificate to appoint guardians <i>ad litem</i>	0	6	8	0	6	8
For amending each copy of a bill or claim to serve, where no reprint	0	6	8	0	13	4
For amending each brief bill, or claim, where no reprint ...	0	6	8	0	13	4
For preparing an original summons for the purpose of proceedings originating in chambers	0	13	4	1	1	0
For indorsing an original summons and the copies under Order VI. of 16th Oct. 1852, and attending to get same sealed	0	6	8	0	6	8
For preparing every other summons, and attending to get same filled up and sealed at chambers	0	6	8	0	6	8
If special, not to exceed ...				1	1	0
For drawing bills of costs, including the copy for the master's office, per folio ...	0	0	8	0	0	8
For certifying proceeding under lower scale of court fees ...	0	5	0			

The fee for drawing a document in all cases includes a copy, if required, for the use of the solicitor or client, or for the settlement of counsel.

For Perusals.

For perusing the print of a bill by the defendant's solicitor	£1	1	0	£1	1	0
If exceeding 60 folios, at per folio				0	0	4
For perusing the print of an amended bill	0	13	4	0	13	4
If amendments exceeding 40 folios, at per folio				0	0	4
For perusing an amended bill when amended in writing ...	0	6	8	0	6	8
If amendments exceeding 20 folios, at per folio				0	0	4
For perusing an answer ...	0	6	8	0	13	4
If exceeding 40 folios, at per folio				0	0	4
For perusing an examination, at per folio	0	0	4	0	0	4
For perusing all special affidavits filed by an opposing party, at per folio	0	0	4	0	0	4
For perusing copy supplemental statement, under 15 & 16 Vict. c. 86, s. 53	0	6	8	0	13	4
For perusing copy order to revive... ..	0	6	8	0	13	4

The fees for perusal are not to apply where the same solicitor is for both parties.

COPIES.

Copies of all documents are to be at the rate of per folio ...	0	0	4	0	0	4
Or per sheet of 10 folios, at ...	0	3	4	0	3	4

Having regard to the preceding fees for perusal, the fee for "abbreviating" is to cease, and no close copies are now to be allowed as of course, but the allowance is to depend on the propriety of making the copy, which in each case is to be shown and considered.

For examining and correcting a proof, at per folio	£0	0	2	£0	0	2
For each copy of a judge's sum- mons, to leave in chambers or to serve	0	2	0	0	2	0
For each copy of a notice of motion, order or certificate to serve	0	1	0	0	1	0
Or at per folio				0	0	4

ATTENDANCES.

For attending on a master's warrant	0	6	8	0	6	8
Or according to circumstances, not to exceed per diem ...	2	2	0	2	2	0
For attending each counsel with his brief, case, or abstract, in a suit or other proceeding in this court	0	6	8	0	6	8
For the like where the fee amounts to five guineas ...				0	13	4
Where it amounts to twenty guineas				1	1	0
Where it amounts to forty guineas or upwards				2	2	0
For attending to pre-ent special petition and for same an- swered	0	6	8	0	6	8
For attending to present peti- tion for order of course, and for order	0	6	8	0	13	4
For attendance on counsel and court on motion of course, and for order	0	6	8	0	13	4
For attending on the day on which a cause or petition stands on the paper for hearing	0	6	8	0	10	0
For attending when heard ...	0	13	4	1	1	0
Or according to circumstances, not to exceed per diem ...				2	2	0
For attending the court on every special motion, each day	0	6	8	0	13	4
The like when heard	0	13	4	0	13	4
Or according to circumstances, not to exceed				1	1	0
For attending on motion for or						

to discharge order for injunction, or <i>ne exeat</i> , when heard, per diem	£0	13	4	£1	1	0
Or according to circumstances, not to exceed				2	2	0
For attending to get answer or special affidavit sworn ...	0	6	8	0	6	8
For attendance on the registrar for directions to the Accountant-General to sell or transfer stock	0	6	8	0	6	8
For attendance on the Accountant-General thereon ...	0	6	8	0	6	8
For attending the Accountant-General with request to lay out cash	0	6	8	0	6	8
The like to carry over cash or stock to another account in his books	0	6	8	0	6	8
For attending Accountant-General to identify a person receiving a cheque	0	6	8	0	6	8
For attending the Accountant-General with order to bespeak, and afterwards to procure his directions for payment of money into court, attending at the Bank of England to pay the money, and for attending on the Accountant-General with the receipt, and at the Report-office to bespeak and to procure the office copy	0	13	4	0	13	4
Where the sum paid in shall amount to 100 <i>l.</i>	1	1	0	1	1	0
And where the same shall amount to 1000 <i>l.</i>				2	2	0
And where the same shall amount to 5000 <i>l.</i>				3	3	0
For attending the master on signing report	0	6	8	0	6	8
For attending to file report and certificates at the Report-office, and for office copy ...	0	6	8	0	6	8
For attending examiner to procure appointment to examine witnesses	0	6	8	0	6	8

For attending the examination of witnesses before examiner	£0	6	8	£0	13	4
Or according to circumstances, not to exceed per diem ...	1	1	0	2	2	0
But if without counsel the fee may, at the master's discretion, be increased to ...	2	2	0	3	3	0
For attending to settle, and afterwards to read over the engrossment of an answer or examination ...	0	6	8	0	13	4
If the same exceed twenty folios and under fifty folios	0	13	4	1	1	0
And for each additional thirty folios ...	0	6	8	0	6	8
For attending to insert an advertisement in <i>Gazette</i> ...	0	6	8	0	6	8
For entering <i>caveats</i> with the clerks of records and writs ...	0	6	8	0	6	8
For attending to procure certificate of a <i>caveat</i> ...	0	6	8	0	6	8
For attending registrar to certify abatement or settlement of suit, and to have same so marked in the cause book ...	0	6	8	0	6	8
For attending the printer with a bill or claim to be printed	0	6	8	0	6	8
For attending to get copies of bill, claim or interrogatories, marked for service ...	0	6	8	0	6	8
For attending to take instructions to appear, and to enter the appearance of one or more defendants not exceeding three ...	0	6	8	0	6	8
If exceeding three, for every additional number not exceeding three ...	0	6	8	0	6	8
For attending at chambers to get original summons and duplicate examined and sealed ...	0	6	8	0	6	8
For attending at the Record and Writ-office to file duplicate and examine copies, and get same stamped ...	0	6	8	0	6	8
For attending on a summons or other appointment, each day, a fee of 6s. 8d., 13s. 4d.,						

or 1*l.* 1*s.*, according to circumstances; each attendance to be allowed by the judge or his chief clerk. Where from the length of the attendance, or from the difficulty of the case, the judge shall think the highest of the above fees an insufficient remuneration for the services performed, or where the preparation of the case to lay it before the judge shall have required skill and labour for which no fee has been allowed, the judge may allow such further fee, not exceeding one guinea, or, where the higher scale is applicable, two guineas, as in his discretion he may think fit [Power to increase to 10 guineas, under Order of 2nd February 1854.]

	£0	6	8	£0	6	8
		to			to	
	2	2	0	3	3	0
For perusing the affidavits of claimants coming in under Order XXXVI. of 16th October 1852, and attending in chambers at the time appointed by the advertisement, where the number of claims do not exceed five	0	10	6	1	1	0
Where the number exceeds five, for every additional number, not exceeding five, an additional sum of	0	10	6	1	1	0
For attending for every order drawn up by the chief clerk, and at the registrar's office to get same entered	0	6	8	0	6	8
For attending to enter claim under Order XXXVI. of 16th October 1852, and to file affidavit	0	6	8	0	6	8
For the plaintiff or party having the conduct of the order, attending the registrar with brief and papers to bespeak minutes or order, not being an order of course ...	0	6	8	0	6	8

For ditto, for preparing list of evidence read (but only when required by the registrar and certified by him)	£0	6	8	£0	6	8
Or according to length, at per folio				0	1	0
Attending to settle the draft or minutes of any decree or order	0	6	8	0	13	4
Or, at the taxing master's discretion, not to exceed ...	1	1	0	3	3	0
Attending to pass any decree or order not being an order of course, including the entry thereof	0	6	8	0	13	4
N.B.—The registrar will leave the order for entry						
In case the registrar shall certify that a special allowance ought to be made in respect of any unusual difficulty in settling and passing an order, the taxing master is to consider the same, and make such allowance to all or any of the parties as to him shall seem just.						
For attending to procure certificate of pleadings	0	6	8	0	6	8
For attending to procure Accountant-General's certificate of fund in court ...	0	6	8	0	6	8
For attending to obtain consent of next friend to sue in his name	0	6	8	0	13	4
For attending to give consent to take answer without oath, to hear cause as short, and for other necessary or proper consents of a like nature ...	0	6	8	0	6	8
For attending to procure such consents	0	6	8	0	6	8
For procuring certificate of counsel to mark cause short, and attending registrar thereon	0	6	8	0	6	8
For attendance to mark master or conveyancing counsel ...	0	6	8	0	6	8

For attendances in consultation or in conference with counsel	£0 13 4	£0 13 4
For attending to set down cause or appeal for hearing ...	0 6 8	0 6 8
For attending to leave papers with judge's secretary prior to hearing	0 6 8	0 6 8
For attending court on appoint- ment of a guardian <i>ad litem</i>	0 13 4	0 13 4
For attending to procure tran- scripts of Accountant-Gener- al's books, when necessary	0 6 8	0 6 8
The fees for consent are to apply where the same solicitor is for both parties.		

WRITS.

For every writ of <i>subpœna duces tecum</i>	0 6 8	0 6 8
For a writ or writs of <i>subpœna</i> other than <i>subpœna duces tecum</i> , if the number of names therein shall not exceed three	0 6 8	0 6 8
If exceeding three names, for every additional number not exceeding three	0 6 8	0 6 8
For preparing every other writ without order	0 6 8	0 6 8
For every writ under order, ex- cept special injunction ...	0 13 4	0 13 4
For special injunction, includ- ing engrossment and docket	0 10 0	1 0 0
Or per folio	0 1 4	0 1 4
For enrolling a decree or order	0 10 0	1 0 0
Or per folio	0 1 4	0 1 4

NOTICES AND SERVICES.

For service of a notice of mo- tion, exclusive of copy ...	0 2 6	0 2 6
For notice to a solicitor of ap- pearance, answer, demurrer, plea, amendment and repli- cation	0 2 6	0 2 6
For notice of claim, under 36th order of 16th October, 1852	0 2 6	0 2 6
For notice of evidence to be read in judge's chambers ...	0 2 6	0 2 6
For notice of filing affidavit or		

set of affidavits filed, or which ought properly to have been filed together, to be read in court... ..	£0	2	6	£0	2	6
For notice of appointment for settling and passing minutes, decrees or orders before the registrar	0	2	6	0	2	6
For copy and service of a warrant on a solicitor	0	2	6	0	2	6
For service of a judge's summons, exclusive of the copy	0	2	6	0	2	6
For service of a petition	0	2	6	0	2	6
For service of an order, exclusive of the copy	0	2	6	0	2	6
For other necessary or proper notice	0	2	6	0	2	6
For services on a party or witness such reasonable charges and expenses as may be properly incurred, according to distance or by the employment of an agent.						

The fees for notices and services are not to apply where the same solicitor is for both parties, unless it be necessary for the purpose of making affidavit of service.

There is to be one notice only of settling minutes, and one notice of passing decree or order, which if necessary are to be continued by adjournment, of which all parties are to take notice.

OATHS AND EXHIBITS.

To the Commissioner for oath in London, according to statute	0	1	6	0	1	6
In the country	0	2	6	0	2	6
To the solicitor for preparing each exhibit in town and country	0	1	0	0	1	0
The Commissioner for marking each exhibit	0	1	0	0	1	0

TERM FEE.

For a term fee in all causes, for every term in which a pro-

ceeding by the party shall take place	£0 10 0	£0 10 0
And for letters per term	0 5 0	0 5 0
In country agency causes the further fee for letters of ...		0 6 8
And if it be shown to the satis- faction of the taxing master that the agency correspon- dence has been special and extensive, he is to be at liberty to make a special allowance in respect thereof.		
In addition to the term fee the necessary expense of the postage, carriage and trans- mission of documents is to be allowed.		
The like term fee and for letters in matters as in causes.		
Where no proceeding is taken which carries a term fee, a charge for letters may be al- lowed, if the circumstances shall require it.		
For any work or labour pro- perly performed and not herein provided for, such al- lowances are to be made as heretofore.		

THE SECOND SCHEDULE.

Being that part of the Order of the 26th Feb. 1807,
which is not discharged or altered.

For perusing abstract, every three brief sheets	0 6 8
For perusing the draft of every deed, for each skin	0 5 0
For examining the engrossment with the draft, for every three skins	0 10 0
For making all attested copies, examining and attesting same, per folio	0 0 6

THE THIRD SCHEDULE.

FEES TO BE COLLECTED BY MEANS OF STAMPS

In the Judge's Chambers.

For every original summons for the purpose of proceedings originating in chambers	£0	5	0	£0	5	0
For every duplicate thereof ...	0	1	0	0	5	0
For every other summons ...	0	1	0	0	3	0
For every order drawn up by the chief clerk, made upon applications for time to plead, answer, or demur, for leave to amend bills or claims, or for enlarging publication, or the period for closing evi- dence	0	1	0	0	5	0
For every other order drawn up by the chief clerk	0	10	0	1	0	0
For every advertisement ...				1	0	0
For every certificate or report	1	0	0	1	0	0
For every certificate upon the passing of a receiver's or con- signee's account, a further fee in respect of each 100 <i>l.</i> received of	0	10	0	0	10	0
For every oath, affirmation, declaration, or attestation upon honour	0	1	6	0	1	6

In the Master's Offices.

For every warrant or summons	0	3	0	0	3	0
For every certificate or report	1	0	0	1	0	0
For taking the acknowledgment of every married woman ...	1	6	8	1	6	8
For attending any court per day by the clerk	0	14	0	0	14	0
For every certificate upon the passing of a receiver or con- signee's account, a further fee in respect of each 100 <i>l.</i> received of	0	10	0	0	10	0

In the Registrars' Office.

For every decree or decretal
order made by the court on a

special case, or on the original hearing of a cause or claim, or on motion for a decree, and on further directions, or further consideration not made on summons adjourned from chambers	£1	0	0	£3	0	0
For every order on petition or motion of course	0	1	0	0	5	0
For every other order	0	10	0	1	0	0
For every office copy of a decree or order, and for every office copy of a petition of appeal or rehearing made on the 3rd of the General Orders of the 25th of October 1852	0	10	0	1	0	0

Note.—The above fees are to include the charge for entry.

In the Examiners' Office.

For every witness sworn and examined, including oath, for each hour	0	5	0	0	5	0
For every witness sworn and examined away from the office (besides coach hire and reasonable expenses) ...	1	7	0	1	7	0
If more than five miles from the examiner's office, for the first day	2	15	0	2	15	0
For every other day	2	2	0	2	2	0
Upon every application to inspect depositions, including the inspection	0	3	0	0	3	0
Upon every application to search book for causes, including search	0	1	0	0	1	0
Upon every application to search book for depositions, including search	0	1	0	0	1	0

In the Record and Writ Clerks' Office.

For making all office and other copies per folio	0	0	4	0	0	4
For filing every bill or information	0	10	0	1	0	0

For filing every claim	£0	5	0	£0	5	0
For filing every special case ...	1	0	0	1	0	0
Upon entering every appearance, if not more than three defendants	0	7	0	0	7	0
If more than three and not exceeding six defendants ...	0	14	0	0	14	0
And the same proportion for every like number of defendants.						
For every certificate	0	4	0	0	4	0
For marking every copy of a bill, claim, or summons to be served	0	1	0	0	5	0
For every writ of summons, distringas, subpoena, or attachment	0	5	0	0	5	0
For sealing every other writ ...	1	0	0	1	0	0
For every oath, affirmation, declaration or attestation upon honour, except for the purpose of receipt of dividends from the Accountant-General	0	1	6	0	1	6
For examining every copy or part of a copy of a set of interrogatories, and marking same as an office copy ...	0	1	0	0	5	0
Upon every application for a search for a record, and for searching	0	2	0	0	2	0
Upon every application to inspect a record, and for inspecting the same	0	5	0	0	5	0
Upon every application to inspect exhibits, if occupied not more than one hour ...	0	5	0	0	5	0
If more than one hour, per diem	0	10	0	0	10	0
Upon every application for the officer's attendance in courts of law per diem, and for his attendance, besides reasonable expenses of the officer	1	0	0	1	0	0
Upon every application for the officer's attendance in a court of equity, and for his attendance, per diem	0	10	0	0	10	0
Upon every application to						

swear an invalid, including the attendance, besides necessary expenses ...	£0	10	0	£0	10	0
For examining and signing enrolments of decrees and orders...	3	0	0	3	0	0
For filing caveat against claim to revive, or against decree or order or enrolment ...	0	5	0	0	5	0
For filing supplemental statement or statement for revivor ...	0	5	0	0	10	0
For filing every affidavit, including schedules and exhibits ...	0	2	6	0	2	6
For every application to inspect affidavit ...	0	0	6	0	0	6
For amending every record of a bill, claim, or special case ...	0	10	0	0	10	0

In the Taxing Master's Office.

For every warrant or summons, but not more than one warrant or summons is to be issued on one bill, or set of bills, unless the taxing master shall think it necessary to issue a new warrant or summons ...	0	1	0	0	3	0
On signing every report and certificate ...	0	10	0	1	0	0
Upon the taxation of every bill of costs, as taxed, where the amount shall not exceed 20 <i>l</i> .	0	10	0	0	10	0
Upon every additional 20 <i>l</i> . or fractional part thereof, a further fee of ...	0	10	0	0	10	0
For every oath, affirmation, or attestation upon honour ...	0	1	6	0	1	6

In the Lord Chancellor's principal Secretary's Office.

On all attendable petitions, appeals, rehearings and letters missive ...	0	5	0	1	0	0
On all nonattendable petitions	0	5	0	0	10	0

On a matter of course order, on a petition of right	£0 10 0	£0 10 0
On an order for a commission on a petition of right	1 0 0	1 0 0

In the Office of the Secretary at the Rolls.

On every petition set down for hearing, to include the fee on hearing	0 5 0	1 0 0
On the petition for every order of course	0 1 0	0 5 0
On the admission of every soli- citor		1 17 0

In the Office of the Accountant-General.

For preparing power of attor- ney with affidavit, exclusive of stamp duty	0 3 0	0 3 0
Upon every application for a search	0 5 0	0 5 0
For transcript of accounts, each opening consisting of debtor and creditor sides of the account	0 2 0	0 2 0

CRANWORTH, C.

J. L. KNIGHT BRUCE, L. J.

G. J. TURNER, L. J.

RICHD. T. KINDERSLEY, V. C.

JOHN STUART, V. C.

WILLIAM PAGE WOOD, V. C.

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